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Supreme Court, U.S.
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No. 96-6298

In The

Supreme Court of the United States

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") on April 24, 1996. The Act's habeas corpus title, *inter alia*, amends 28 U.S.C. § 2254(d). The questions on which the Court granted review are:

I.

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in § 107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases?

II.

If so, whether the court of appeals correctly supplanted this Court's antiretroactivity presumption, triggered by new legal consequences attached to completed events, with a presumption that habeas-curtailing statutes apply retroactively and with a test for retroactive effects that requires proof of actual reliance?

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OPINIONS BELOW

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JURISDICTION

The court of appeals entered judgment on September 12, 1996. A petition for a writ of certiorari was filed on October 10, 1996, and granted in part on January 10, 1997. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. §§ 2241-2266, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, and § 107(c) of the Act, which are reproduced in Appendix I *infra*.

STATEMENT OF THE CASE

The Court's grant of certiorari on January 10 was limited to the first question presented in Aaron Lindh's petition: whether § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 applies to cases pending when the Act became law on April 24, 1996. The Court has deferred a second question: whether the court of appeals interpreted § 2254(d) consistently with its terms and the Constitution. JA 233. The following facts and prior proceedings pertain to the question now before the Court.

A. Statement of Facts

At noon on January 15, 1988, Mr. Lindh left a meeting with City Police Department officials in the City-County Building in Madison, Wisconsin and went to his car. Upset at the City Police Department's failure to solve two burglaries at

his apartment, Lindh took a rifle from the car, went back into the Building to the offices of the Dane County Sheriff's Department (with which he had no quarrel) and began shooting people he had never met. Two persons died; a third was wounded. Lindh then pointed his rifle at an armed deputy sheriff and advanced, shouting "Shoot me! Kill me!" The deputy shot him. JA 72, 89-90, 92.

That evening, Dr. Leigh Roberts, a forensic psychiatrist engaged by the state to meet Lindh's anticipated insanity defense, interviewed Lindh in the intensive care unit. Roberts later filed a report with the prosecutor concluding that Lindh had no mental disease at the time of the shootings. Roberts' conclusion was the mainstay of the state's case at trial, where Lindh's sanity was the sole contested issue. JA 73-78, 84-85.[1]

Six weeks after being retained on Lindh's case, Dr. Roberts learned that a patient had charged him with having sexual relations with her during treatment sessions, a felony under state law. Two months later Roberts learned that the Wisconsin Medical Examining Board was investigating allegations that he had sexually exploited three patients. A month later, University of Wisconsin Hospital officials referred the patients' allegations against Roberts to the District Attorney for investigation of felony charges. JA 76-77.

Professing to avoid a "conflict of interest," the D.A. elected to continue employing Roberts on Lindh's case and refer the charges against him to another prosecutor. About a month after the D.A. told Roberts of the Hospital's charges and the D.A.'s referral of them, Roberts filed his report with the D.A. finding Lindh free of mental disease. JA 34-35, 77.

After the Examining Board's effort to suspend Roberts' license became public, the D.A. filed a motion to forbid cross-examination of Roberts concerning "any possible ramifications of the [criminal] allegations" against him including his suspension by the University Hospital. Over objection, the

[1] A psychiatrist appointed by the court and one retained by the defense testified that Lindh was suffering from a mental disorder at the time of the shootings. JA 14-15, 77-78, 79, 99-100.

trial court granted the motion. JA 10-13, 19-36, 77. Accepting Roberts' view that Lindh was not suffering from a mental disease, the jury found him guilty of two counts of first-degree murder and one of attempted first-degree murder. Lindh was sentenced to two life terms plus 35 years. JA 89, 153.[2]

B. Direct Appeal and District Court Proceedings

The Wisconsin Court of Appeals reversed the convictions, concluding that jurors informed that Roberts was himself under criminal investigation might reasonably have discounted his testimony as biased in the state's favor. JA 84. A divided Wisconsin Supreme Court reversed, finding no Sixth Amendment Confrontation Clause violation. JA 87.

Lindh did not seek certiorari or state postconviction relief. Instead, on July 9, 1992, he filed a federal habeas petition presenting the confrontation claim. JA 1. The state answered but declined to file the trial transcript. JA 141-42. Mr. Lindh moved to compel production of the transcript and to set a briefing schedule. JA 45-47. The state asked the court to defer ordering a transcript and accept briefs on an argument that it had not raised in the Wisconsin courts: that the Confrontation Clause did not apply to Wisconsin's procedure for adjudicating sanity at trial. JA 48. On September 22, 1992, Lindh asked the court to order the transcript or take briefs on the state's new argument. JA 51-53.

For the next 18 months, nothing happened, aside from Mr. Lindh's filing three letters requesting prompt action. JA 60-66. Two days after Lindh's third letter, on March 4, 1994, the district court ordered briefs on the Sixth Amendment's application to the sanity phase. Briefs were timely filed by early May. JA 1, 67.

[2] Three months after Lindh's trial, Roberts pled guilty to one count of sexual exploitation. On the state's recommendation, the judge spared Roberts any jail time or fine, citing his work on behalf of prosecuting authorities throughout the State of Wisconsin as a forensic psychiatrist. JA 197, 217.

For the next 17 months, nothing happened, except more correspondence from Lindh seeking a prompt ruling. JA 69-70. On October 4, 1995, the district court denied the petition, declining to order a transcript or address the issue the parties had briefed. It held that the Sixth Amendment permitted disallowance of cross-examination about Roberts' potential bias based on past or hoped-for prosecutorial favors relating to his own criminal travails. JA 141-51.

Mr. Lindh appealed, arguing his case to a panel on April 9, 1996. The 1996 Act became law two weeks later. The court of appeals *sua sponte* then announced that it would take the case *en banc* and directed the parties to file briefs on the effect of amended § 2254(d) upon Lindh's pending case. JA 155-56. By a vote of 8-3, the Court held that the new § 2254(d) applied and barred relief.[3] JA 199, 219.

C. The Decision Below

1. Section 2254(d)'s applicability – statutory intent

The court of appeals first addressed Mr. Lindh's argument that amended § 2254(d) does not apply to his long-pending petition because § 107(c) of the Act expressly designates the class of "cases pending on . . . the date of enactment of this Act" to which its habeas amendments do apply – specifically, capital cases in "opt-in" jurisdictions – and

[3] Prior to the *en banc* order, the state had not claimed that § 2254(d) applied to Lindh's case. When the state thereafter argued that § 2254(d) applied and substantially altered the standard for relief, Lindh moved to supplement the record with evidence documenting the claims he would have made in state postconviction proceedings in 1992, in lieu of a federal habeas petition, had he known that his habeas remedy was limited in the manner the state now proposed. The court of appeals (over dissent) denied the motion to supplement the record because it was made "only . . . after the case had been set for rehearing en banc." JA 171, 199-200.

Lindh's case is not within that category.[4] The court ruled that § 107(c) creates "at most a negative implication" of congressional intent. It declined to draw that implication rather than the possible "competing inference . . . that Congress could not agree on an effective-date provision for the amendments [that include § 2254(d)]" or "overlooked" the matter. JA 158.

The court also rejected Lindh's observation that the application of amended § 2254(d) to all pending cases would render newly enacted § 2264(b) inexplicable, because the sole apparent function of the latter provision is to incorporate certain amendments of § 2254 – subsections (d) and (e) – into the set of provisions that § 107(c) makes applicable to "pending" opt-in cases.[5] To avoid this reasoning, the court interpreted § 2264(b) as establishing (by negative implication) that *none* of the Act's amendments of § 2254 or other preexisting habeas provisions *except* §§ 2254(d) and (e) apply to *any* capital opt-in cases, whether filed before *or* after the Act's enactment.[6] JA 159-61.

[4] The habeas title of the Act amends Chapter 153 of the Judicial Code (which includes § 2254 and most other preexisting statutes relating to the writ) and adds a new Chapter 154 (which enacts special provisions governing capital cases in states that "opt-in" by meeting specified procedural requirements). Section 107(c) makes the opt-in provisions of the Act but no others (except insofar as they are incorporated by the opt-in provisions) applicable to "cases pending . . . on the date of enactment."

[5] Because §§ 2254(d) and (e), as amended by Chapter 153, apply to all habeas actions governed by the new statute, there is no reason for § 2264(b) to incorporate those provisions into Chapter 154 unless the Chapter 153 modifications do not independently apply to pending cases and so had to be incorporated into Chapter 154 to make their important revisions applicable to pending "opt-in" cases via § 107(c).

[6] In addition to amended §§ 2254(d) and (e), Chapter 153 includes the exhaustion of remedies requirement (28 U.S.C. § 2254(b), as amended), restrictions on successive petitions (*id.* § 2244(b), as amended); and limitations on appeals (*id.* § 2253, as amended). The court of appeals read § 2264(b) to deny "opt-in" states the benefit of all these provisions.

2. Section 2254(d)'s applicability – retroactivity

The court then held that applying the new § 2254(d) to Lindh's case would not have a "retroactive" effect within *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994). The court gave two reasons why § 2254(d)'s application to pending cases could be held to fall outside the "definition of retroactivity."[7] First, it circumscribed *Landgraf*'s presumption against applying a statute that "attaches new legal consequences to events completed before its enactment." *Id.* at 270. Disagreeing with two other circuits, the court held that any effects of amended § 2254(d) that would "reduce [Lindh's] chance of prevailing" from what it was when he filed his petition "will not do" as a new consequence under *Landgraf*. JA 162, 168. Although § 2254(d) imposes significant new "limits on the granting of the . . . relief provided by the writ of habeas corpus," this "does not attach new legal consequences to the filing of [habeas] petitions." JA 177, 162. The only completed events to which new consequences attach that bring the *Landgraf* presumption into play are particular actions that Lindh can prove he took in "reliance on the prior state of the law." JA 170.

The court held that "Lindh lacks any reliance interest nearly that strong." *Id.* Apprehension of a lowered chance of relief in federal habeas would not have affected his decision to forgo state postconviction or certiorari proceedings because (1) the rule of *State v. Escalona-Naranjo*, 517 N.W.2d 157 (Wis. 1994), forbids state collateral attack absent an "unusual reason," which Lindh does not have " – and, if he does, the state courts remain open to him"; and (2) Lindh's case does not present "an abstract legal question" but a claim that the state courts misapplied settled law to the facts, so he "had no prospect in 1991 of receiving an audience in the Supreme Court" and "gave up nothing" by not seeking certiorari. JA 171. In response to the argument that this Court

[7] The court also said that § 2254(d) "affects the relation between federal and state courts, rather than regulating the details of the litigation, [so] the date on which the petition was filed" is unimportant. JA 163.

exercises its certiorari power with advertence to the availability *vel non* of habeas review, the court of appeals limited Lindh to his own behavior; he "cannot successfully argue that the change of law [would have] affected the judicial process." JA 164.

A second reason for declining to find retroactive effect was that "legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments." JA 166. As evidence of a "consistent[ ]" "historical practice" reflecting this presumption, the court cited *Felker v. Turpin*, 116 S.Ct. 2333 (1996); two 1950 decisions of this Court applying the exhaustion of remedies doctrine in cases commenced before the doctrine's codification in 1948; two 1968 decisions citing the 1966 habeas amendments in cases filed before their adoption; and § 2254(d)'s language – the writ " 'shall not be granted unless . . . ' " – which "is prospective." JA 166-67.

3. Section 2254(d)'s interpretation

The court of appeals next construed the central provision of amended § 2254(d) barring relief on constitutional claims adjudicated in state court unless the state "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. . . . " JA 175. Mr. Lindh fundamentally disagrees with the court's construction, which defies § 2254(d)'s plain words, Article III and the Suspension Clause. Although for current purposes, Mr. Lindh must "assume that . . . the Court of Appeals properly applied the law," *Landgraf*, 511 U.S. at 250, he does so only *arguendo* in order to inquire whether, if the court's interpretation were applied to his case, it would " 'take[ ] away or impair[ ] vested rights acquired under existing laws, or create[ ] a new obligation, impose[ ] a new duty, or attach[ ] a new disability, in respect to transactions or considerations already past.' " *Id.* at 269. That inquiry requires a summary of the court's construction of § 2254(d).

Conceding that "Congress lacks power to . . . require federal judges to 'defer' to the interpretations reached by

state courts," the court below asked whether § 2254(d) "tell[s] us to 'defer' to state decisions." JA 185, 175. Because "the word 'deference' does not appear in the statute" – and federal deference to state "jurisdictions bound by [the Supremacy Clause] is not sensible" – the court held that the statute does not require it. JA 176. "The first phrase of § 2254(d)(1) – authorizing a federal court to issue the writ when the state court's decision is 'contrary to . . . clearly established Federal law, as determined by the Supreme Court . . . ' preserves . . . federal courts' independent interpretive power." *Id.*

The court declined, however, to "read the 'contrary to . . . law' language to authorize issuance of a writ whenever a [state] court errs." JA 179. "[W]hen the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts – when it is, in the standard phrase, a 'mixed question of law and fact' – § 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects 'an unreasonable application' of the law." JA 180. Because mixed questions are ones "of degree," "painted in shades of grey, rather than in contrasting colors, a responsible thoughtful answer reached after a full opportunity to litigate is adequate. . . . " JA 182. In mixed-question cases, that is, § 2254(d) "tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called 'unreasonable.' " JA 180-81.

The court summed up the "line" separating review under § 2254(d)'s "decision contrary to law" phrase and its "unreasonable application" phrase as "[d]e novo . . . review for core legal issues such as whether the Confrontation Clause applies, and deferential review for operational decisions within areas in which the constitutional norm allows discretion." JA 198.

Applying this interpretation to Mr. Lindh's case, the court held that the Wisconsin Supreme Court decision was not "contrary to . . . clearly established Federal law" because the "opinion . . . correctly states the holdings" of this Court's Confrontation Clause decisions. *Id.* And the state court's application of those decisions to the facts was not "unreasonable" because, under the majority's reading of those cases, if

the trial judge allowed cross-examination of any sort aimed at showing that Roberts was not telling the truth, the judge had discretion to completely bar cross-examination into any specific motive to lie. JA 197-98. This being only a question of "degree," the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong (as some members of this court who join this opinion believe)." JA 196-97.

SUMMARY OF THE ARGUMENT

The question of the applicability of newly enacted 28 U.S.C. § 2254(d) to pending cases has two identical answers, one supplied by Congress, the other added – if need be – by the "judicial default rules" of *Landgraf v. USI Film Products*.

One, Congress accepted the responsibility that *Landgraf* sought to cultivate in the Legislative Branch in the first instance: it addressed the question of the temporal reach of the Habeas Corpus Title of the 1996 Act in two controlling provisions. In one – § 107(c) of the Act – Congress directly designated those habeas revisions that are applicable to "cases pending on . . . the date of enactment of this Act" and those that are not. Then, in a second provision – 28 U.S.C. § 2264(b) – Congress fine-tuned the consequences of the basic determinations regarding retroactivity that it had prescribed by § 107(c): it specified that two of the Act's revisions, which would otherwise have been inapplicable to any "cases pending," nevertheless *do* apply to certain pending cases. Thus, Congress has clearly spoken. The arguments to the contrary are that Congress may not have understood what it was saying and may have meant to leave the matter to judicial determination after all. If such arguments can be made against this statutory text, they can be made to undercut any statutory text; and their acceptance would leave no practical haven from judicial second-guessing of the fundamentally legislative policy judgments involved in fixing boundaries of a new statute's proper scope.

Two, should the Court look past the decisive statutory text, *Landgraf*'s authoritative default rules for judicial retroactivity decisions would preclude the application of the 1996

amendments of § 2254(d) – particularly as those amendments were interpreted by the court below – to habeas cases pending on the date of enactment. *Landgraf*'s own reasoning and the two hundred years of precedents which inform it unmistakably establish that the traditional presumption against statutory retroactivity is triggered by the "new legal consequences" that any such application of § 2254(d) would attach to completed events; and nothing – literally nothing – can be brought forward to overcome the presumption in this case. The court of appeals avoided the presumption by invoking two supposed counter-principles that legally do not exist and never have.

ARGUMENT

I. Introduction

The question presented is whether a single provision of the 1996 Act – 28 U.S.C. § 2254(d) – applies to this action, filed 45 months before the amendment became law. In Part II we show that the Act itself answers this question by specifying the habeas provisions that "shall apply to cases pending on . . . the date of enactment of th[e] Act" and omitting § 2254(d) from the list. Act, § 107(c). In Part III we show that, even if the Act's words were not dispositive, this Court's decision in *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), would forbid the application of the court of appeals' interpretation of § 2254(d) to Lindh's case because that would attach radical new legal consequences to events completed before the statute was law.[8] Preliminarily, in this Part we describe the extreme effect of the lower court's interpretation on habeas cases such as this, then summarize *Landgraf*'s standard for deciding whether a new law applies to pending cases.

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[8] We assume the validity of the court of appeals' interpretation of § 2254(d) only *arguendo*, in keeping with the Court's decision to proceed initially with the "applicability" question. See pp. 1, 7 *supra*; note 19 *infra*.

A. The Effect of Section 2254(d) as Interpreted Below

A key provision of amended § 2254(d) permits habeas relief from unconstitutional confinement if the state "decision [upholding the confinement] was contrary to . . . clearly established Federal law as determined by the Supreme Court."[9] The court below construed the provision as forbidding relief unless a state decision applying the Constitution to the facts is not merely "wrong" under the legal standards clearly established by this Court's precedents but so grossly wrong as to be "unreasonable." Under that construction, Congress empowered federal judges to review state court decisions for consistency with the Constitution but required them to leave the decision of a case like Lindh's in force and effect although it decrees a result at odds with the supreme law of the land. The novel consequences of such a construction were applied retroactively to Lindh's four-year-old petition despite manifest congressional intention *not* to affect previously filed cases of this type and despite the *Landgraf* presumption against retroactivity, which was converted below into a presumption *of* retroactivity and a rule about reliance.

These conclusions conflict with those of most federal courts that have considered § 2254(d)'s applicability to pending cases[10] and with venerable notions about the prospectivity of new law. To see why, it is necessary to consider both "the

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[9] 28 U.S.C. § 2254(d)(1) (habeas application "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

[10] See *e.g.*, *Jeffries v. Wood*, 1996 WL 730493, at *1 (9th Cir. Dec. 20, 1996); *Boria v. Keane*, 90 F.3d 36, 37-38 (2d Cir. 1996); *Edens v. Hannigan*, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996); *Satcher v. Netherland*, 944 F.Supp. 1222, 1247-48 & n.15 (E.D. Va. 1996) ("overwhelming majority of federal courts . . . have held that the Chapter 153 Amendments [including § 2254(d)] are not applicable to pending [noncapital] petitions" (citing cases)). But see *Drinkard v. Johnson*, 97 F.3d 751, 765-66 (5th Cir. 1996).

nature and [the] extent of the change in the law" that the court of appeals' interpretation produces. *Landgraf*, 511 U.S. at 270. The *nature* of that change is to alter the habeas cause of action – to "adjust the circumstances under which the remedy of the writ of habeas corpus is deployed" and "prescribe limits on the granting of the . . . writ." JA 186, 177. Whereas petitioners proceeding under the preexisting statute had only to demonstrate custody arising from constitutional error, *Moore v. Dempsey*, 261 U.S. 86 (1923), those proceeding under the new one must prove, in addition, that the constitutional "error [is] grave enough to be called 'unreasonable.' " JA 181.

To comprehend the *extent* of this "retrenchment from former practice" (JA 177), consider a prisoner convicted on a confession that the state courts held voluntary under the established rule of *Brown v. Mississippi*, 297 U.S. 278 (1936). Before the 1996 amendment, a federal habeas court treated a petition raising an involuntariness claim as "a new suit brought . . . to enforce a civil right." *Ex parte Tom Tong*, 108 U.S. 556, 559-60 (1883). The federal habeas court adjudicated the claim entirely *de novo*, paying the state supreme court's decision no more heed than other relevant authority – *i.e.*, treating it as nothing more than "the conclusion of a court of last resort of another jurisdiction." *Brown v. Allen*, 344 U.S. 443, 458 (1953); see *Stone v. Powell*, 428 U.S. 465, 477 (1976) ("full reconsideration of . . . constitutional claims").

Such a claim was governed by the "longstanding position that the ultimate question of the admissibility of a confession . . . [is] a legal inquiry requiring plenary federal review." *Miller v. Fenton*, 474 U.S. 104, 115 (1985). Even if the state opinion correctly stated the rule of *Brown v. Mississippi* and its progeny, the federal court was obliged to grant relief if the decision applying that rule and admitting the confession was wrong. *Id.* at 112.

Teague v. Lane, 489 U.S. 288 (1989), did not alter this responsibility when it barred the creation of new legal rules on habeas. For when "the rule in question is one which of

necessity requires a case-by-case examination of the evidence, . . . a rule designed for the specific purpose of evaluating a myriad of factual contexts," the rule "can tolerate a number of specific applications without saying that those applications themselves create a new rule." *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment).

In short, then, if a prisoner's conviction rested on a confession that the state courts had held voluntary by applying the governing legal standard to the totality of circumstances, but that a federal court would find was involuntary under the same standard and circumstances, the prisoner's filing of a habeas petition triggered an unconditional right to release or retrial. This remedy was qualitatively superior, in virtually every case, to other state and federal remedies, given its "as of right" character, immunization from *res judicata* defenses, and availability without further development of the record.

Indisputably, amended § 2254(d) changes things in the cases to which it applies. The crucial questions are what and how much it changes, and to what cases it does apply. By its terms, amended § 2254(d) follows *Teague*'s lead in limiting federal habeas review to rules of law that are not new – *i.e.*, to rules that were "clearly established" at the time of direct review. Extending *Teague*, the amendatory language of § 2254(d)

- requires federal courts to treat the state decision as more than relevant authority – as the focus of review, and, barring a statutorily specified error, the law of the case;
- unqualifiedly limits federal review to legal rules *in effect* when the state court ruled – thus abandoning *Teague*'s application on habeas of law announced after the state court ruled but before certiorari was due or denied (or even later, in two exceptional situations), cf. *Teague*, 489 U.S. at 305, 307; and
- confines review to legal rules that *bound* the state courts when they decided the case – *i.e.*, rules that were clearly established by this Court, and not just a federal circuit court.

This is what § 2254(d) as amended says it does. But on the elaborate reading given it by the court below, the statute goes much further and in quite surprising directions. On that reading, a federal court's finding of a constitutional violation in admitting an involuntary confession into evidence produces habeas relief only if the state reviewing court somehow managed to misstate the one-word "voluntariness" test – only if its "opinion . . . [in]correctly states the holdings" of *Brown v. Mississippi* and its progeny. JA 198. If the state court correctly articulated the rule but incorrectly applied it to the facts so as to produce an outcome that "errs" under established standards, the federal court (in all but a few "grave" cases, JA 181) can do nothing but ineffectually point out the error. JA 179. Though it is "free to express an independent opinion on [the] legal issues in the case," it cannot attach any legal consequence to its conclusion that the decision conflicts with the Constitution; it must leave the legally erroneous decision in force. JA 176, 179.

And in deciding whether the state court's error was "unreasonable" or "grave," the court must consider that the requisite totality of circumstance analysis is "painted in shades of grey, rather than in contrasting colors." JA 182. Consequently, a state court's "fact-specific answer *cannot* be called 'unreasonable' even if it is wrong. . . . " JA 197 (emphasis added).

The reading below thus converts habeas corpus from a right to relief when a state court has erred in applying clearly established law to the facts into a summary denial of relief in that situation. It changes habeas from a remedy having every advantage over alternative remedies into one that is inferior to any remedy with the minutest possibility of success. It works precisely the " 'far reaching' " "change [in] the standard of review" and "in . . . the authority conferred by the habeas corpus statute" to which Justice O'Connor referred in *Wright v. West*, 505 U.S. at 306 (O'Connor, J., concurring in the judgment).[11]

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[11] Courts in the two circuits that follow *Lindh* have noted how severely it alters the writ. See, *e.g.*, *Gomez v. Acevedo*, 1997 WL 39864, at *6 (7th Cir. Feb. 3, 1997) ("only deferential review for reasonableness"); *Brown v. Cain*, 1997 WL 20736, at *2, *4 (5th Cir. Jan. 21, 1997) ("substantial deference"); *Abrams v. Barnett*, 100 F.3d 485, 492-93 (7th Cir. 1996) (purely procedural inquiry into whether state decision "correctly cited" Supreme Court law and "carefully relied on . . . the record"); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996) (new "standard of review . . . akin to the . . . 'clearly erroneous' standard"); *Neal v. Gramley*, 99 F.3d 841, 843 (7th Cir. 1996) ("extremely limited" review); *United States ex rel. Centanni v. Washington*, 1997 WL 22632, at *12 (N.D. Ill. Jan. 17, 1997) ("severe test"); *United States ex rel. Jones v. Gilmore*, 1996 WL 568804, at *1 (N.D. Ill. Sept. 27, 1996) ("major hurdles").

As is developed below, the court of appeals' retroactive application of these drastic consequences to Mr. Lindh's case cannot stand under *Landgraf*'s standards for determining the applicability of new law to pending cases.

B. The *Landgraf* Standard for Assessing the Applicability of New Legislation to Pending Cases

Landgraf confirms that the question whether a new law applies to pending cases is fundamentally one of statutory intent. As with all such questions, " 'where the congressional intent is clear, it governs.' " *Landgraf*, 511 U.S. at 264 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990)). Where statutory intent was unclear, however, the courts had applied a number of different rules, some of which were in " 'apparent tension' " with each other. *Landgraf*, 511 U.S. at 264.

Landgraf undertook to clarify the appropriate analysis by articulating a three-step process for determining to what cases a new statute will apply. *Id.* at 263-80; see *Lockheed Corp. v. Spink*, 116 S.Ct. 1783, 1792 (1996). Step One of the analysis is to determine "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280; *Lockheed*, 116 S.Ct. at 1792 (Court "must determine whether Congress has plainly delineated the temporal scope of the [new] amendments"). If Congress has done so, the analysis is over; "there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

When the statute contains no such delineation, Steps Two and Three of the analysis are necessary. In Step Two, the Court "determine[s] whether the new statute would have retroactive effect" – *i.e.*, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 280, 269-70.

If the Court determines that the new law would have "new legal consequences," then at Step Three the "traditional presumption" against statutory retroactivity applies, and the new law is held inapplicable to pending cases unless a "clear congressional intent" to ordain such retroactive application appears. *Id.* at 280. Conversely, if the Court determines that the new statute would *not* have new legal consequences constituting "genuinely 'retroactive' effect" (for example, if it involves what are sometimes loosely called "procedural" or "remedial" matters, *id.* at 276, 285 n.37), a presumption arises in favor of applying the statute to pending cases; but this presumption may be overcome by a showing of " 'manifest injustice or [that] there is statutory direction or legislative history to the contrary.' " *Id.* at 277 (quoting *Bradley v. School Bd.*, 416 U.S. 696, 711 (1974)).

In the instant case, Step One in the *Landgraf* analysis is decisive, because Congress has "plainly delineated the temporal scope of the [1996] amendments," *Lockheed*, 116 S.Ct. at 1792, and has excluded § 2254(d) from those that apply to pending cases. Moreover, the amended § 2254(d) would attach "new legal consequences" to completed events in a manner that would raise the presumption against retroactive operation if the section's application to pending cases were considered in conformity with *Landgraf*'s Step Two. But it does not ultimately matter which step or aspect of *Landgraf*'s analysis this Court elects to focus on initially; they all point to the same outcome more or less directly.

Inasmuch as the language and the structure of the habeas provisions of the 1996 Act bear upon both Step One and Step Three, it will be most efficient to discuss those two steps together. And because Steps One and Three are straightforward and will spare the Court the need to parse the new legal consequences of § 2254(d) – a subject that is complicated by

the court of appeals' reading of the amendment – we begin with the legislative text (in Part II.A) and its instruction for Steps One and Three in *Landgraf* (in Part II.B) before proceeding to Step Two (in Part III).

II. The Court of Appeals Misread the Act as Leaving to the Courts to Decide, Rather than Specifying, the Provisions that Shall Apply to Cases Pending on the Date of Enactment

A. The Structure of the 1996 Act's Habeas Provisions

The changes to habeas corpus law made by the Antiterrorism and Effective Death Penalty Act of 1996 are set forth in Title I of that Act. Title I contains two sets of revisions.

First, Title I amends four preexisting sections of Chapter 153 of the Judicial Code, provisions that apply to all habeas cases, capital and noncapital. Act §§ 101-106, *amending* 28 U.S.C. §§ 2244, 2253-2255. *Second*, Title I adds an entirely new chapter to the Judicial Code – Chapter 154 – which consists of six provisions applicable only to capital cases from states that have opted to establish their own postconviction procedures meeting certain requirements. Act § 107, *enacting* 28 U.S.C. §§ 2261-2266.

New § 2254(d) – the revision at issue in this case – is one of the revisions to *Chapter 153*.

B. Congress Clearly Intended and Plainly Expressed that the 1996 Amendments to Chapter 153 of Title 28 Are to Be Applied Prospectively Only

All of the ordinary indicia of statutory intent – the language and the structure of the 1996 law, the background against which the law was enacted, and well-established rules of statutory construction only recently called to Congress' attention – converge in this case. They all show that the revisions to Chapter 153 are not supposed to apply to cases pending on the date of the new law's enactment. Congress has "expressly prescribed the statute's proper reach." *Landgraf*,

511 U.S. at 280. At the very least, congressional intent is clear. Thus, under either Step One or Step Three, the result is the same. (See subsection 1 below.) The arguments that have been raised to the contrary, including those proffered by the court below, are unpersuasive. (See subsection 2 below.)

1. As a matter of express language and of statutory intent, none of the 1996 Act's revisions to Chapter 153 of Title 28 is applicable to Mr. Lindh's case

In its 1994 *Landgraf* decision, this Court recognized that its "precedents [had] left doubts about what default rule would apply in the absence of congressional guidance" on the question whether a new statute applies to pending cases. 511 U.S. at 261. To resolve the "Congressional doubt concerning judicial retroactivity doctrine," *id.*, *Landgraf* informed Congress that future substantive legislation would normally be presumed *not* to apply to pending cases. *Id.* at 277, 286. The Court did this both to "giv[e] legislators a predictable background rule against which to legislate" and to "assur[e] that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," thereby "allocat[ing] to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Id.* at 272-23.

Just two years after *Landgraf*, the 1996 Law was enacted, with its habeas corpus revisions in Title I. Undoubtedly aware of the recent *Landgraf* decision crystallizing a "predictable background rule,"[12] Congress considered the question whether any portion of Title I would be applied to cases pending before the Act went into effect. Congress reached a different answer for each Chapter. The answers were announced in the statutory text in two places: in § 107(c) of the Act and in § 2264(b) of newly enacted Chapter 154.

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[12] *Landgraf*, 511 U.S. at 273; see *id.* at 257-58 n.10; *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 698-99 (1979).

a. Section 107(c) of the Act.

The issue of Title I's temporal reach is most directly addressed in § 107(c) of the Act. 110 Stat. 1214, 1226. It provides that "*Chapter 154* of title 28, United States Code (as added by subsection (a) [of § 107]) *shall apply to cases pending on* or after *the date of enactment* of this Act" (emphasis added). By its express terms, § 107(c) identifies which "cases pending on the date of enactment" are subject to the habeas corpus revisions in the Act, and it specifies which of the revisions apply to those pending cases. Succinctly, the Act makes all of the Chapter 154 revisions applicable to pending capital cases in qualified opt-in jurisdictions.

The Act's express language making the Chapter 154 provisions applicable to these particular pending cases and its omission of any similar language in regard to the Chapter 153 provisions (which were next-door neighbors in the very same Title of the same Act) reveals a clear statutory intent that *only* the Chapter 154 provisions apply to pending cases. This conclusion follows naturally, by straightforward reasoning that this Court has repeatedly used in interpreting statutory texts. "The fact that Congress chose to impose some forms of [retroactivity], but not others, indicates a *deliberate congressional choice* with which the courts *should not interfere*." *Central Bank v. First Interstate Bank*, 511 U.S. 164, 184 (1994) (emphasis added). "Obviously, then, when Congress wished to provide [for retroactive application of habeas corpus reform], it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979).[13]

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[13] See *Custis v. United States*, 511 U.S. 485, 491 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1983)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213-14 (1988).

Thus, by itself, the language of § 107(c) conveys both that Congress considered the question of Title I's proper reach and that it made a "deliberate" choice to "provide[ ] precisely the [retroactive applications] it considered appropriate." *Central Bank*, 511 U.S. at 184; *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 15 (1981). Inasmuch as there are no "indicia of a contrary congressional intent" (*id.*) – let alone the requisite "strong" indicia (*id.*) – the plain text of the statute should be enforced just as it reads: retroactive application of the new habeas provisions in Title I is limited to Chapter 154 cases.

The conclusion that § 107(c) designates exclusively the portions of the Act's habeas provisions that apply to pending cases is reinforced still further by the fact that § 107(c) was enacted just two years after *Landgraf*. Congress was surely aware of the "predictable background rule" of *prospectivity* that *Landgraf* had taken pains to pronounce, partly because such a rule "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." 511 U.S. at 273. In this context, the enactment of a retroactivity provision in Title I of the Act that included one group of revisions (Chapter 154) but excluded another (Chapter 153) ratifies the construction derived from the plain text alone: the Chapter 153 revisions do *not* apply retroactively to "cases pending on" the date of enactment.

b. Section 2264(b).

Congress' answer to the retroactivity question did not stop with § 107(c). Had it enacted only § 107(c), then only the new *Chapter 154* provisions would have applied to pending cases from opt-in states; the revisions to *Chapter 153* were not among those made applicable to Chapter 154 cases "pending on . . . the date of enactment." § 107(c). But the 1996 Act was making significant revisions to provisions within Chapter 153, particularly § 2254(d) and § 2254(e) (affecting evidentiary hearings). Because none of Chapter 153's provisions was independently applicable to pending cases, Congress had to take an additional step, beyond specifying that Chapter 154's

provisions would apply to pending cases, to make §§ 2254(d) and (e) applicable to pending Chapter 154 cases.

And Congress did so. It enacted a provision within Chapter 154 – § 2264(b) – that specifically assimilated the new §§ 2254(d) and (e) into the proceedings for those pending cases that fall within Chapter 154's reach.[14] Had Congress intended the revisions in Chapter 153 to apply to all pending cases, there would have been no need to enact § 2264(b), because §§ 2254(d) and (e) would have been independently applicable. Section 2264(d) can be explained only if Congress intended to do precisely what § 107(c) says: to make Chapter 154 and its contents alone applicable to pending cases. Any other reading would make § 2264(b) mere surplusage. But "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enter.*, 117 S.Ct. 660, 664 (1997).

2. The arguments against the Act's plain meaning are meritless and would replace *Landgraf*'s analysis with a presumption that courts and not Congress should determine the retroactivity of new laws

Despite these clear indications in the Act, the court below concluded that Congress did not answer the "retroactivity question," but left the matter for the judiciary to resolve. JA 158. The court found that § 107(c) raised "at most a negative implication" as to the Act's temporal reach. *Id.* It

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[14] Section 2264(b) provides that "[f]ollowing review subject to subsections (a), (d), and (e) of § 2254, the court [in a Chapter 154 case] shall rule on the claims properly before it." Although § 2264(b) refers to § 2254(a), which was not amended by the Act, that reference is entirely logical: once Congress expressly made §§ 2254(d) and (e) applicable to pending cases within Chapter 154's scope, it added a reference to § 2254(a) to forestall a court from concluding, based on "*expressio unius est exclusio alterius*," that Congress had intentionally excluded § 2254(a). See *Walters v. Metropolitan Educ. Enter.*, 117 S.Ct. 660, 665 (1997) (" 'mere' elimination of evident ambiguity is ample – indeed, admirable – justification for the inclusion of a statutory phrase").

rendered § 2264(b) irrelevant by reading that section – through the very "negative implication" reasoning that it had just rejected with respect to § 107(c) – as designed to limit the provisions of Chapter 153 that apply in *any* Chapter 154 proceeding, including cases filed after enactment. JA 160. The court of appeals' reasoning was flawed at virtually every step. We address those flaws first. (Subsections B.2.a-B.2.c below.) Then we take up additional arguments that the state or its *amici curiae* are likely to proffer. (Subsections B.2.d-B.2.e.) What is interesting about all of these arguments is that none of them claims to find any affirmative evidence that the revisions to Chapter 153 are intended by Congress to apply to pending cases; rather, all are aimed at delivering the whole subject of retroactivity back into the keeping of the courts.

a. "Congress left the retroactivity issue to judicial resolution."

Initially, the court of appeals misapplied *Landgraf* by inferring that Congress "le[ft] the subject [of Chapter 153's retroactivity] to judicial resolution." JA 158. *Landgraf* did reach such a conclusion with respect to the 1991 Civil Rights Act, but it did so for two reasons. First, it found affirmative evidence that Congress intended the courts to decide the retroactivity issue. As *Landgraf* explained, extensive retroactivity provisions had been included in a previous version of the Civil Rights Act that was vetoed, and thereafter Congress eliminated those provisions from the version that the President agreed to sign. 511 U.S. at 255-56. Second, at the time the 1991 Act was passed, this Court's "precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance." *Id.* at 261.

Nothing remotely akin to these two considerations exists in the present case. No affirmative evidence of any sort suggests that Congress intended to fob off the habeas corpus retroactivity issue to the courts. And *Landgraf* itself resolved the preexisting "doubts about what default rule would apply." *Id.* Consequently, in sharp contrast to the backdrop of the 1991 Civil Rights Act, the rule in effect when the 1996 habeas

corpus legislation was enacted clearly informed Congress that, if it did not make its intent regarding retroactivity clear, the result would not be to invoke judicial creativity but to trigger a presumption of prospective application.[15]

Given these differences, the court of appeals' conclusion that Congress left the matter to the courts has stood *Landgraf* on its head. Under the Seventh Circuit's analysis, the rule would be that retroactivity issues will *always* be decided by the courts unless Congress explicitly provides to the contrary. This "rule" is the exact opposite of what *Landgraf* strove for: to "allocate[ ] *to Congress* responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." 511 U.S. at 273 (emphasis added). And the Court had good reasons to assign Congress this responsibility, since a determination as to whether a new enactment should apply to pending cases or past conduct involves a weighing of "the benefits of retroactivity [against] the potential for disruption or unfairness," *id.* at 268, 272-73 – basic legislative judgments of policy for which the courts are ill-suited.

b. " 'Negative implications' cannot form the basis for finding a statute to have purely prospective operation."

The court below also misanalyzed what it termed the "negative implication" argument based on § 107(c). The court

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[15] The court of appeals speculated that "[p]erhaps" Congress simply "overlooked" the question whether Chapter 153 should apply to pending cases because "the changes to Chapter 153 and the new Chapter 154 originated in different Houses of Congress at different times." JA 158. The court's speculation is wrong. While the substantive provisions of Chapter 154 did originate in a different House of Congress at a different time from those of Chapter 153, *this is not true of the retroactivity provision of § 107(c)*. That section was added in the Senate, *after* all the other Chapter 154 *and* Chapter 153 provisions (including § 2254(d)) were in the bill in their final form. Compare 141 Cong. Rec. S7567 (May 25, 1995) with S.735, tit. VII(A) (May 1, 1995) (available on LEXIS); see p. 28 *infra*.

concluded that because *Landgraf* rejected a "negative implication" argument in that case, a "negative implication" argument should fail in every case. JA 158-60. This mischaracterizes Mr. Lindh's argument – and misreads *Landgraf*.

First, Lindh's argument would stand upon more than a "negative implication" even were it limited to § 107(c) (which it is not). For § 107(c) *is* the Act's designation of which cases its habeas revisions apply to. This is no matter of "implication": § 107(c) *specifies* Chapter 154 as the single subject of application to pending cases.

Second, contrary to the court of appeals' understanding, there is nothing inherently inadequate about a "negative implication" argument in retroactivity jurisprudence (see, *e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-14 (1988)) although the specific "negative implication" argument made in *Landgraf was* inadequate. Barbara Landgraf's "negative implication" argument was premised on a provision in the 1991 Civil Rights Act that made "two comparatively minor and narrow provisions in a long and complex statute" prospective only. *Landgraf*, 511 U.S. at 258. From this, she argued that Congress meant the rest of the "long and complex statute" to apply retroactively. *Id.* This Court did not agree, because Congress would not have "chosen to resolve [the retroactivity issue] through negative inferences drawn from two provisions of quite limited effect" and because "doubts about what default rule would apply" existed at the time the 1991 Act was passed. *Id.* at 259, 260-61 & n.12.

Landgraf's careful and considered approach to the "negative implication" argument made in that case is at odds with the court of appeals' assumption that such arguments are invalid or suspect as a class. And the factors that *Landgraf* pointed to as reasons why the "negative implication" argument failed there are the opposite of the factors bearing on Lindh's case. The provisions that § 107(c) makes applicable to pending cases are not "comparatively minor and narrow provisions" of "quite limited effect." Section 107(c) makes the entirety of Chapter 154 applicable to pending cases; and Chapter 154 comprises *fully half* of the Act's habeas revisions. Indeed, the capital-specific Chapter 154 revisions in

Title I were so important to Congress that it named the entire *nine-title* Antiterrorism and *Effective Death Penalty Act* after those provisions. Nor, two years after *Landgraf*, was Congress unaware of what inferences would be drawn from its silence. *Landgraf* told Congress, before it enacted the revisions to Chapter 153, what conclusion would be drawn if it did not specify whether those revisions applied to pending cases. It is one thing to conclude, as in *Landgraf*, that a negative implication will be insufficient to warrant *retroactivity* when the negative implication is opposed by affirmative indications of contrary congressional intent and is based on minor provisions of "limited effect" that were enacted when there was doubt about the default rule the courts would apply. It is quite different when *expressio unius* reasoning is used to justify *prospective* application, is consistent with all other indicators of statutory intent, and is derived from a specification of retroactivity governing a central component of the new law, enacted after the Court had pronounced a background rule favoring prospectivity.

c. "Petitioner's 'misunderstanding' of section 2264(b)."

As previously noted, the nonretroactivity conclusion to be drawn from § 107(c) is corroborated within Title I itself by the enactment of 28 U.S.C. § 2264(b), the sole function of which is to apply certain specified provisions found in the otherwise nonretroactive Chapter 153 to pending cases covered by Chapter 154. See subsection II.B.1.b above. The court of appeals claimed that this reasoning "misunderstands" § 2264(b). JA 159.

According to the court of appeals, § 2264(b) is a statute that delineates which provisions in Chapter 153 will have *any* application in Chapter 154 proceedings, not a statute delineating which *amended* provisions will apply to *pending* Chapter 154 cases. In the court's view, the Chapter 153 provisions listed in § 2264(b) are adopted into Chapter 154, and those omitted are – by negative implication – "replace[d] [with a provision] more favorable to the states." JA 160. This construction of § 2264(b) is patently wrong.

At the outset, the irony of this rationale should not be lost on the Court. The court of appeals was willing to espouse a "negative implication" in connection with § 2264(b) but not with § 107(c); and it neither explained the inconsistency nor seemed to notice it.

Moreover, the court of appeals' interpretation of § 2264(b) – not its use of negative implication, but the implausibility of what it implied – will produce outlandish results. Rather than lead to rules that are "more favorable to the states" in Chapter 154 cases, the court's interpretation will instead *withdraw* defenses that are currently available to these states. Consider, for example, the court of appeals' assertion that, because the exhaustion doctrine of 28 U.S.C. § 2254(b) is not listed in § 2264(b), that doctrine has been "replace[d]" by § 2264(a).[16] This would mean that, in a Chapter 154 proceeding, the state could not demand that important claims be exhausted in state court, as, for example, when a prisoner discovers a claim after state direct and postconviction proceedings and can establish that the factual predicate for the claim "could not have been discovered [earlier] through the exercise of due diligence." 28 U.S.C. § 2264(a)(3). Under the court of appeals' reading, such a claim would never have to be exhausted in state court at all. Exhaustion would not be required by the general exhaustion statute – Chapter 153's § 2254(b) – because (according to the court below) that section's exhaustion requirement has been "replace[d]" by § 2264(a), JA 160; and § 2264(a) would not require the claim to be "raised and decided on the merits in the State courts" because of § 2264(a)'s own "due diligence" exception (quoted in note 16).

Indeed, under the lower court's reading, the state in this situation would lose no less than *three* important benefits

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[16] In pertinent part, § 2264(a) provides that in Chapter 154 proceedings, "the district court shall only consider a claim or claims that have been raised and decided on the merits in State courts, unless the failure to raise the claim properly is . . . based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review." 28 U.S.C. § 2264(a)(3).

embodied in Chapter 153. First, the claim could not be returned to the state courts for exhaustion of state remedies because the exhaustion statute has assertedly been "replace[d]" by § 2264(a). Second, and as a result, the state courts would never get the opportunity to make factfindings in regard to the claim that are entitled to a presumption of correctness in federal habeas proceedings. Cf. *id.* § 2254(e)(1). Third, and most queerly, the prisoner could entirely circumvent the new adjudication standard of § 2254(d) itself – § 2264(b) notwithstanding. Section 2254(d) is triggered only if the "claim" previously "was adjudicated on the merits *in State court proceedings*." *Id.* § 2254(d) (emphasis added). By eliminating the exhaustion requirement, the court of appeals' reading would allow the prisoner to take the newly discovered claim directly to federal court under § 2264(a)(3), without ever letting a state court "adjudicate [it] on the merits in State court proceedings" and, thus, without triggering § 2254(d).

There is no evidence that Congress meant to achieve any of these results. The more reasonable conclusion is that it was the court of appeals, not petitioner, that "misunderstood" § 2264(b).

d. The relevance of the retroactivity provisions elsewhere in the Antiterrorism Act.

It has been argued (though not by the court below) that the Antiterrorism Act contains both retroactivity and prospectivity provisions outside of Title I, and thus that the failure to include Chapter 153 within § 107(c) has no meaning. See *Hunter v. United States*, 101 F.3d 1565, 1569-70 (11th Cir. 1996). This argument is meritless.[17]

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[17] Although the *Hunter* court listed five sections of the Act that it thought applied changes made by the Act solely to post-enactment cases, in fact only two of the provisions fall into that category. In the other three sections, Congress clearly *did* apply the new provisions to pending cases but was selective as to *which* pending cases the provisions are to govern. *See* Act, § 211 (changes in restitution law apply to pending cases in which defendant had not been convicted as of date of enactment); § 235(h)

Any inter-title analysis of the Antiterrorism Act is an illusory endeavor because the Act's fitful process of construction did not resemble a single author's crafting of a cohesive monograph in nine chapters, but instead the transcontinental journey of a locomotive picking up (and shedding) freight cars from a variety of railroads, with cars bearing their own design, cargo and insignia, and each lacking any clues as to the provenance and content of the others. However, unlike the Act as a whole (and most of its other titles), the *habeas* title *was* crafted as a cohesive whole by members of the Senate Judiciary Committee, and their deliberate decision to make the Chapter 154 provisions, but not the Chapter 153 amendments, applicable to pending cases was made following careful consideration of the habeas title – but only the habeas title – as a whole. See 141 Cong. Rec. S7803 (June 7, 1995). There is, thus, every reason to embrace Congress' manifest intent to apply the Chapter 154, but not the Chapter 153, provisions to pending cases.

The legislative history of § 107(c) confirms this point. Section 107(c) was first added to the habeas title of the Act as part of an omnibus amendment offered on May 25, and approved by the Senate on June 7, 1995. *Id.* at S7567, S7857, S7868-71. The addition of § 107(c) (then, § 607(c)) was the only habeas-related change in the June 7 omnibus amendment; the other habeas revisions in what would become Title I were already in the bill, in their final form. Compare original S.735, tit. VII(A) (May 1, 1995) (available on LEXIS; see 141 Cong. Rec. S5841) with S.735 as revised by Amendment 1199 (141

(closed circuit television provisions apply to pending cases filed after January 1, 1995); § 903 (attorney-compensation provisions apply to pending cases in which appeal is perfected on or after enactment date). The other two sections *Hunter* cites (§§ 435 & 441) both came from an immigration bill passed by the House of Representatives, and were added to the Act by the Senate more than nine months after § 107(c) had been added. *See* pp. 28-29 *infra*. And one of these sections *had* to apply only in the future, because it took away a defense to a criminal charge. Act, § 441 (limiting use of faulty deportation order as defense to crime of illegal reentry).

Cong. Rec. S7567 (May 25, 1995)). At the time § 107(c) was added, there were only two other provisions anywhere in the Act that alluded to pending or future court cases, and *both* provisions operated just like § 107(c); they made specified new provisions in the Act *retroactive* to pending cases. §§ 206(c), 303(f). *None* of the five allegedly "prospective only" sections relied on in *Hunter* was in the bill at that time, and they did not become part of the Act until nine month later, when numerous provisions of a House immigration bill were incorporated into the bill that became the 1996 Antiterrorism Act. See 142 Cong. Rec. H2288 (March 14, 1996).

The supposedly "prospective" provisions elsewhere in the Act have no relevance to the otherwise clear and quite explicit intent of § 107(c): at the time § 107(c) was adopted (and for nine months thereafter), the Act contained no provisions limiting *any* of its new laws to future cases, and thus there is no reason to doubt that § 107(c) means exactly what it says.

e. "The critical date for retroactivity purposes is the date of future court decisions."

A final argument that might be made concerning the applicability of the Chapter 153 provisions to pending cases is that Congress did not intend for the issue of prospectivity or retroactivity to turn on when a habeas case was filed but on the time at which any cognizant court (in this case, the court of appeals) comes to make a ruling that turns upon the law affected by the particular provision in question (in this case, amended § 2254(d)). A moment's consideration reveals that this argument is doubly flawed.

First, § 107(c) demonstrates that when Congress was considering the issue of the temporal reach of Title I, it saw the critical event to be whether a "case" was "pending" on the date of enactment. Only by injecting a very different view as to the determinative retroactivity event could a court decide that the Act was actually meant to apply prospectively to future "rulings" in "cases pending" on "the date of the enactment of this

Act."[18] Second, any decision that the Chapter 153 amendments apply to future federal court decisions on pending or future habeas cases would render § 2264(b) a nullity, turning it into useless surplusage (unless one adopted the implausible interpretation of that section tendered by the court of appeals in this case).

* * *

In sum, the court of appeals wrongly disregarded Congress' express directive and demonstrable intent that only Chapter 154 in the Act, not Chapter 153, is to be applied "to cases pending on . . . the date of enactment." Act, § 107(c).

III. The Court of Appeals Misread *Landgraf* and Two Centuries of Retroactivity Law in Concluding that it Could Apply § 2254(d) to Mr. Lindh's Case Notwithstanding the New Legal Consequences its Interpretation Attaches to Pre-Act Events

The Act's clear specification of the pending cases – not including Mr. Lindh's – to which its habeas revisions apply is dispositive of § 2254(d)'s inapplicability here. Were that not

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[18] Any such holding would unsettle *Landgraf* itself. For, by parity of reasoning with the argument here, the "determinative event" in *Landgraf* would occur when a decision was made as to compensatory damages. (After all, the statute at issue there refers to a plaintiff's "recovery" of compensatory damages, not to the tortfeasor's behavior.) Although, in *Landgraf* itself, the damages decision had already been made by the district court before this Court's ruling (indeed, before the 1991 Act), other cases raising similar claims had not yet reached a damages decision by either date. If the relevant retroactivity event in *Landgraf* was a court decision on whether to award compensatory damages, the rule it announced should have been that the 1991 Act did not apply to pending cases that had already reached a damages ruling, but *did* apply to pending cases that had not. That was not what *Landgraf* held, and it would require a major reworking of retroactivity jurisprudence to reach such a result. Moreover, any such reworking would lead to further problems. Continuing with the *Landgraf* example, if the relevant retroactivity event is a court proceeding on compensatory damages, the new law would apply on appeal of a damages decision – and thus make *Landgraf* wrong even as to Barbara Landgraf.

so, *Landgraf* would provide an alternate route to the same conclusion, because the designedly result-altering interpretation that the court below gave to § 2254(d) "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. Whereas Lindh had a matured and unconditional right to habeas relief when he filed his July 9, 1992 petition showing custody and constitutional error, the April 24, 1996 amendment of § 2254(d) as interpreted below would require him to show in addition that the error was "unreasonable" and "grave," and then would deny him relief because errors "painted in shades of grey" "*cannot* be called 'unreasonable.' " JA 181-82, 197 (emphasis added). Because the longstanding presumption of prospectivity precludes these retroactive effects absent a clear statutory directive – lacking here – *Landgraf* forbids the application of § 2254(d) as interpreted below.[19]

The court of appeals based its conclusion that § 2254(d) has no retroactive effects on two premises: (1) that "new legal consequences" are limited to those that adversely affect a party's "legitimate reliance interests in the operation of the former law," JA 157; and (2) that there is a "presumpti[on]" that "legal changes that reduce the willingness of federal courts to set aside [state] judgments . . . apply to existing judgments." JA 166. Both premises are wrong. As any tenable reading of *Landgraf*'s "new consequences" test reveals, and as is confirmed by a line of cases stretching back 200 years from *Landgraf* and its companion, *Rivers v. Roadway Express*, 511 U.S. 298 (1994), there is no more classically "retroactive effect" than the changed outcome produced by applying a

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[19] Mr. Lindh emphasizes again that the posture of the case requires him for the sake of argument to treat the court of appeals' interpretation as a given despite its fatal statutory and constitutional flaws. If the Court concludes that Step Two of *Landgraf*'s retroactivity analysis is crucial to the issue of § 2254(d)'s applicability and that the analysis turns on the consequences that a properly interpreted § 2254(d) would attach to pending cases, it should then expand the issues under consideration to include Question 2 in Lindh's certiorari petition and permit supplementary briefing.

statute that alters the shape of a cause of action to a law suit by which that cause of action already had "matured and become unconditional" before the statute was enacted.

A. "New Legal Consequences" Are Not Limited to Those that Adversely Affect a Party's Reliance Interests and Extend to Normative, Outcome-Determinative Changes in Matured Causes of Action

1. The court of appeals' flawed reliance analysis

Permeating the court of appeals' analysis is its assertion that the only "new legal consequences" that "matter[ ]" for retroactivity purposes are those that adversely affect a litigant's "legitimate reliance interests in the operation of the former law."[20] The court's transformation of the "new legal consequences" inquiry into a search for "reliance interests" is entirely unsupported – indeed, rejected – in the case law.

To begin with, the "new consequences" test has for two centuries been the Court's measure of retroactive effects.[21] Yet, the Court has *never* qualified the test with anything like a "reliance" requirement. Rather, as the Court commented in a footnote in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), only "one line of cases" – comprised of three decisions, the latest decided 58 years ago – treats reliance as a "significant" factor. *Id.* at 18 n.16.[22] Moreover, *Usery* and two

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[20] JA 157; see JA 163, 165-66, 170 (retroactivity turns on "steps [Lindh] took" in "reliance on . . . prior . . . law"; whether he can prove " 'reliance on past [law] . . . as a basis for his actions' "; whether, "when deciding . . . to commit a crime . . . he relied on the availability of the version of § 2254 that was on the books"; and whether there was a "reliance interest nearly that strong").

[21] See *Landgraf*, 511 U.S. at 269-70 & n.23 (citing numerous cases); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

[22] All three cases addressed a question different from the one here – whether a new statute that *expressly* applied to the dispute was sufficiently retroactive to violate due process. See *Carpenter v. Wabash Ry.* 309 U.S. 23

of the cases it cites are part of a much longer and more distinguished line of decisions – all of them taken by *Landgraf* as authoritative – in which courts have found retroactive effects despite the clear *absence* of reliance interests affected by the new statute. Because the decisions are so numerous – some are collected in Appendix II to this brief – it must suffice here to discuss two of them, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), and *Rivers*.

In *Bowen*, the Government sought to invoke a 1984 regulation, which it had adopted to replace an identical 1981 regulation that was struck down on procedural grounds in 1983, in order to recoup some of the Medicare reimbursements paid the respondent hospitals for the 1981-1983 period. The Government's argument was "no reliance": Because the 1981 regulation had notified the hospitals of the rule that the 1984 regulation reinstated, the hospitals could not complain that preexisting law had misled them in any way when they performed the 1981-1983 services in question. *Bowen*, 488 U.S. at 215. The Court's holding was "new legal consequences": Because the higher rate was legally in force when the hospitals' right to reimbursement matured – between the 1983 demise of the initial regulation and its resurrection in 1984 – applying the new regulation would have the effect of decreasing the reimbursement to which they previously were entitled by law. *Id.* at 207. And the Court's precise answer to the Government's "no reliance" argument was, "irrelevant" – the Court declined to determine whether the hospitals had or had not relied. *Id.* at 215. In concurrence, moreover, Justice Scalia expressly *assumed* that "the invalidated 1981 [regulation] furnished respondents with 'ample notice' of the standard that . . . applied" and concluded that "[i]t makes no difference." *Id.* at

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(1940); *Welch v. Henry*, 305 U.S. 134 (1938); *Louisville & N. Ry. v. Mottley*, 219 U.S. 467 (1911). Two of the cases – as did *Usery* itself – held the statute "retroactive" (but not unconstitutionally so) under the "new legal consequences" test *despite the acknowledged absence of any frustrated reliance interests*. See *Usery*, 428 U.S. at 17; *Welch* at 146-48; *Louisville & N. Ry.*, at 484; Appendix II *infra*. The third case found reliance, but upheld the statute anyway. *Carpenter* at 24-25, 29.

225 (Scalia, J., concurring). Although the absence of frustrated reliance interests might have rendered the 1984 regulation's application less "unfair," "[t]he issue is not whether . . . rule-making is fair" but whether it is "retroactive" – which Justice Scalia concluded the 1984 regulation was, in violation of the Administrative Procedure Act. *Id.*

Six years later, in *Rivers*, the Court declined to apply § 101 of the 1991 Civil Rights Act to a pending case in order to provide a remedy for private discrimination under § 1981 of the sort the Court had held unavailable in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Rivers*, 511 U.S. at 304. Again, the plaintiffs' argument was "no reliance": § 101 could not be said to have blindsided the defendant, whose discriminatory acts occurred *before Patterson*, when the "prevailing understanding of the reach of § 1981" and all the immediately governing precedents forbade the discrimination. *Id.* at 307, 309 n.9, 312-13. And again, the Court found the absence of reliance unimportant and decided the case under the new legal consequences test. Although acknowledging "that respondent ha[d] *no persuasive claim to unfair surprise*, because, at the time the allegedly discriminatory discharge occurred, the [governing] precedent held that § 1981 could support [the plaintiffs'] claim," the Court held § 101's application retroactive because it "alter[ed] the normative scope" of § 1981 liability as *Patterson* had authoritatively defined it prior to § 101's adoption. *Id.* at 303, 309 n.9 (emphasis added).

Landgraf itself could hardly be clearer about the non-dispositive role of reliance interests in retroactivity analysis. It specifies a wide range of ways in which a "new legal consequence" may be found, and by no means limits itself to situations involving a "reliance interest." Among the kinds of statutory provisions that have "retroactive effects" are those that (1) "affect[ ] substantive rights," *Landgraf*, 511 U.S. at 278, or (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280, or (3) "sweep away settled expectations suddenly and without individualized consideration," *id.* at 266, or (4)

" 'change[ ] the legal consequences of acts completed before [the new law's] effective date,' " *id.* at 269 n.23, or (5) "give[ ] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed,' " *id.*, or (6) "impos[e] new burdens on persons after the fact," *id.* at 270, or (7) may be "retributive," *id.* at 282, or (8) "creat[e] a new cause of action," *id.* at 283, or (9) " 'change . . . the principles of liability,' " *id.* at 285 n.37; or (10) " 'change . . . the amount or the elements of damage in [a] wrongful-death statute,' " *id.* at 284 n.36; or (11) " 'increase, decrease or repeal' " "limits on the amount of damages available," *id.*; or (12) "*restrict*[ ] subcontractors' rights to recover damages from prime contractors," *id.* at 285, or (13) "alter the normative scope" of a preexisting right of action, *Rivers*, 511 U.S. at 303.

The wide range of legal changes encompassed by a "new consequences" approach to retroactive effects responds directly to the many "sound considerations of general policy and practice" that the antiretroactivity presumption serves. *Landgraf*, 511 U.S. at 270, 286. In discussing those policies, *Landgraf* repeatedly makes clear that it is not just reliance interests, but "settled expectations" of all kinds, that "should not be lightly disrupted."[23] *Id.* at 266. Thus, as *Landgraf* notes, the legislature is not an ordinary private "promisor" that needs be "estopped" from breaking unilateral promises only when a "promisee" detrimentally relies. Rather, there are numerous *public* harms that motivate the presumption of prospectivity, and, similarly, *ex post facto* doctrine, the rule against arbitrarily withdrawing entitlements generated by positive law, and other limits on government promise-breaking – as to *none* of

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[23] *Landgraf*, 511 U.S. at 270 ("retroactivity is a matter on which . . . considerations of fair notice, reasonable reliance, *and* settled expectations offer sound guidance"); *id.* at 282 n.35 ("concerns of unfair surprise *and* upsetting expectations"); *id.* at 265 n.18 (" 'deprive citizens of legitimate expectations *and* upset settled transactions' "); *id.* at 266 ("interests in fair notice *and* repose") (all emphasis added).

which which has detrimental reliance ever been required:[24] There is, for example, (1) "[t]he Legislature's unmatched powers . . . to sweep away settled expectations suddenly and without individualized consideration," *id.*; (2) its "responsivity to political pressures . . . and [the] risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals," *id.*; (3) its capacity to use retroactive legislation to interfere with "the judicial Power" over pending cases;[25] (4) citizens' inability to insulate themselves from the government, as they can from private promise-breakers whom they distrust – and the dangers that attend distrust of the state; (5) the inefficiencies and dislocations that arise when individuals not only are denied the chance to have behaved differently in the past to avoid the effects of a new law but, more importantly, are impelled to behave differently in the future – to " 'speculate on public measures' " or take other actions to insure against unpredictable legislative changes;[26] and, above all, (6) the danger of sacrificing "stability," "repose," and "a rule of law that gives people confidence

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[24] The *Ex Post Facto* Clause forbids states after the fact to increase the punishment to which offenders may be subjected, though the change (*e.g.*, in the method of computing "gain time" in prison) is too modest, technical and contingent to alter potential offenders' behavior or have a predictable effect on any given offender. See, *e.g.*, *Lynce v. Mathis*, 65 U.S.L.W. 4131 (U.S. Feb. 18, 1997); *Weaver v. Graham*, 450 U.S. 24, 35-36 & nn.18-20 (1981); Laurence H. Tribe, American Constitutional Law 629 (1988) ("reliance . . . cannot account . . . for the [*ex post facto* cases]."). The Court's procedural due process cases provide another close analogy to antiretroactivity doctrine. And in that context as well, it is the state's withdrawal of a legally created expectation *per se*, and not the frustration of reliance interests, that triggers constitutional protection. See examples in Appendix III *infra*. The same is true of doctrines forbidding state officials to give individuals an "implied promise" that their silence will not be used against them, then penalize them for keeping silent. See *id.*

[25] See *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1452, 1461-62, 1469 (1995); Norman J. Singer, Sutherland's Statutes and Statutory Construction § 41.08 (5th ed. 1992).

[26] *Landgraf*, 511 U.S. at 267 n.20. When legislatively created expectations are secure, most litigants will choose the single best option

about the legal consequences of their actions." *Id.* at 266, 271.[27] As the Court stated nearly 200 years ago, in refusing to read a new law so as to impair expectations (in a case in which there "admit[tedly]" was no reasonable reliance, see Appendix II below):

> [T]hat confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation . . . suggested by her own laws . . . [u]nless . . . the words [of a later statute affecting that right] are too imperious to admit of a different construction. . . .

United States v. Heth, 7 U.S. (3 Cranch) 399, 408 (1806).

Landgraf, indeed, explicitly subordinated reliance in its precise holding. It concluded that awarding compensatory damages under § 102 of the 1991 Civil Rights Act would impermissibly "impose . . . a 'new disability' in respect to past events," notwithstanding that respondent's reliance claims

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among the potential means of redress – in Lindh's case, habeas, rather than state collateral or certiorari, review. Under the regime inaugurated by the court of appeals, however, in which *in*security reigns, litigants are compelled to pursue *all* available means of redress in hopes that one will remain available when a court finally rules. The pertinent question thus is not what Aaron Lindh would have done in the past had he seen the 1996 Act coming, but rather what millions of litigants will do in the future when they realize that they may be freely subjected to legislation that they can't see coming.

[27] See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 Const. Commentary 329, 355 (1993) ("Injuries that are caused by decisions solely traceable to . . . [the legislature] represent a betrayal of trust in a way that is not the case when the triggering decision is made by an individual acting entirely in his or her own interest."); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 465 (1982) ("[E]ven if planning is not involved, something important may be at stake, for some aspects of the rule of law involve human dignity. If the 'rules of the game' are altered retroactively, and without good warrant, then the legal system is saying in effect that those disadvantaged . . . do not count for much.").

lacked "force" because the new provision "only reache[d] discriminatory conduct already prohibited"; were "further muted" because most "such discrimination was . . . already subject to monetary liability in the form of back pay"; and were additionally "attenuated" by the "intentional" and "morally reprehensible" nature of the "discrimination, which has been unlawful for more than a generation." *Landgraf*, 511 U.S. at 282-83 & n.35. Because the best that could be said was that reliance "concerns would not be entirely absent," *id.* at 282 n.35, the Court rested its holding, instead, on the conclusion, irrespective of reliance, that "creating a new cause of action" for compensatory damages "attach[ed] an important new legal burden" in respect to past events: "[C]ompensatory damages are quintessentially backward-looking"; they "make victims whole . . . by a mechanism that affects the liabilities of defendants"; they "confer[ ] a new right to monetary relief" by "increasing the amount of damages available under a pre-established cause of action." *Id.* at 282-83. Although " '[r]etroactive modification' of damages remedies may 'normally harbo[r] much less potential for mischief than retroactive changes in the principles of liability,' . . . that potential is nevertheless still significant." *Id.* at 285 n.37 (citation omitted). See *Rivers*, 511 U.S. at 303 (similar).

In addition to defying precedent, the court of appeals' translation of "new legal consequences" into a "legitimate reliance interest" is a conceptual and practical disaster. It sends the courts down a long, chaotic and uncharted road that can only lead to one of two unhappy destinations. Either every pending habeas case (indeed, every litigant's case, whenever the legislature amends *any* statute without clearly indicating whether it applies to pending cases) would have to be examined on an individual basis (as the court of appeals purported to do here, *see* JA 171) to see what the party and his or her lawyers relied on in making significant litigation decisions – an inquiry in which the courts would presumably have to conduct an evidentiary hearing as to the motives and bases of

those decisions.[28] Or, alternatively, the courts could attempt to decide the issue of reliance on the basis of some generalized speculation as to what an entire class of litigants in petitioner's position would rely on (as the court of appeals also purported to do, *see* JA 170) – in which event, the courts would have to define the relevant class in each case: is it, for example, all habeas petitioners? all noncapital habeas petitioners? all habeas petitioners with Sixth Amendment claims? with claims involving "mixed questions of fact and law"? all who passed up alternative remedies of one or another sort before filing their habeas petition? all from a particular state? Either way, "the judiciary" would be burdened "with the micromanagement of an endless array of" factual and "speculative" possibilities. *California Dep't of Corrections v. Morales*, 115 S.Ct. 1597, 1603 (1995). Only by broadly defining the concept of "new legal consequences," as the Court's decisions culminating in *Landgraf* have always done, can this prolonged and ill-defined retroactivity sidetrack be avoided.

2. The retroactive effect of legislatively altered outcomes of matured causes of action

The holdings of *Landgraf* and *Rivers* do more than reject reliance as the alpha and omega of retroactivity analysis. They also place those cases squarely in line with the classics of American retroactivity law – the very decisions in which the "new legal consequences" test was developed and on which

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[28] States' Attorneys advancing the detrimental reliance test are now demanding that petitioners support reliance claims by affidavit or evidentiary proof. See Brief for Respondent-Appellee State of Massachusetts at 22, *Martin v. Bissonette*, No. 96-1856 (1st Cir. filed Jan. 24, 1997). And well they might. Each of the crucial prerequisites of the promissory estoppel doctrine to which the court below appealed – actual and substantial reliance, foreseeability of reliance, detriment, and mitigation – is a question of fact rarely susceptible to summary judgment. See, *e.g.*, *Thermocor, Inc. v. United States*, 35 Fed. Cl. 480, 490 (1996); *Vastoler v. American Can Co.*, 700 F.2d 916, 920 (3d Cir. 1983); 1 Corbin on Contracts § 8.9 (E. Mills, ed. 1996).

Landgraf expressly premised its holding. See *Landgraf*, 511 U.S. at 270, 283-85 (citing *Winfree v. Northern Pac. Ry.*, 227 U.S. 296 (1913); *United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306 (1908); *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.); *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. 1811) (Kent, C.J.)). Each of these cases – and many others besides – involved a new statute's potential interference with a preexisting judicial or administrative "right of action" or defense.[29] In each, the court explicitly determined that the rights involved were such that (in the older terminology) they had "vested"[30] or (in modern terms) they "had matured or become unconditional"[31] upon the formal initiation of the proceeding – in the elementary sense that the preexisting statute under which the action was filed recognized nothing that could thereafter occur (short of the movant's death) that would alter the parties' rights and liabilities.[32] In

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[29] See, *e.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 4 (1926) ("defeat claims on which suits duly brought were then pending"); *Winfree*, 227 U.S. at 302; *Murray v. Gibson*, 56 U.S. (15 How.) 420, 423 (1853); *Society*, 22 F. Cas. at 759, 768; *Dash*, 7 Johns. at 497, 502 ("take away or clog a remedy which a party has by . . . law"; "defeat a suit already commenced, upon a right already vested"); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 243 (1927) ("where a remedy is extinguished or substantially impaired and no alternative remedy [is] provided").

[30] *E.g.*, *Struthers*, 209 U.S. at 312; *Heth*, 7 U.S. (3 Cranch) at 414; *Society*, 22 F. Cas. at 767-69.

[31] *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985); *Bradley v. School Bd.*, 416 U.S. 696, 720 (1974) (citing cases).

[32] After inquiry "to ascertain the probable legislative intent," the courts in these cases determined that the proceeding's formal initiation constituted the "determinative event by which retroactivity . . . [was] to be calculated." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 & n.3 (1990) (Scalia, J., concurring). See, *e.g.*, *Bennett*, 470 U.S. at 637, 639-40 ("pre-existing right to recovery," which matured upon government's issuance of "final determination letter" demanding refund); *Greene v. United States*, 376 U.S. at 153, 160 ("petitioner's rights matured

each case, the court also determined that the precise intent of the *new* statute was substantially to alter the normative scope of the cause of action or defense – by, for example, changing the elements of the action or defense, the standard of review, the burden of proof, or the amount of available relief.[33] And in

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and were asserted" upon filing of administrative complaint, *i.e.*, "after the claim had arisen and had been formally asserted"); *United States v. Magnolia Petr. Co.*, 276 U.S. 160, 162 (1928) (administrative "claims fixed [upon filing for refund] in accordance with earlier [statutory] provisions"); *Struthers*, 209 U.S. at 315 ("respective rights of the parties settled, and the cause of action already in existence"); *Society*, 22 F. Cas. at 759, 761, 767 (accepting claim that "right of recovery was . . . perfect and unconditional" or "absolute and unconditional" when suit was brought and rejecting claim that right could not "vest" until plaintiff actually "shall have recovered"); *Dash*, 7 Johns. at 479-80, 483-84, 494 (rejecting claim that right of action could not vest until relief was granted because "plaintiff, at the commencement of his suit, had a vested right of recovery against [defendant]"); *Mathews v. Kidder, Peabody & Co.*, 947 F.Supp. 180, 185 (W.D. Pa. 1996) (applying new law would "deprive [plaintiffs] of their RICO causes of action which were viable at the time this lawsuit was filed"); *District 65 v. Prudential Sec.*, 925 F.Supp. 1551, 1570 (N.D. Ga. 1996) (right of action " 'vested' " "[u]pon filing of the complaint").

The requirement that the right to relief have matured and become *unconditional* upon the filing of the suit distinguishes the Court's cases applying statutory changes affecting the right to injunctions, licenses, and other similar relief. In those cases, the preexisting statute itself provided that changes in conditions up to the very moment the court or agency ruled could alter the parties' rights. See *e.g.*, *Ziffrin, Inc. v. United States*, 318 U.S. 73, 75 (1943) (where, *inter alia*, change in ownership of applicant company at any time before license was granted or denied would affect right to license, Commission properly applied statute adopted "between the filing of the application and the entry of the order denying it").

[33] See, *e.g.*, *Landgraf*, 511 U.S. at 277 (changes in " 'the main cause of action' "); *Bennett*, 470 U.S. at 638 ("changes in substantive requirements for [relief]"); *Greene*, 376 U.S. at 156, 163 (regulation "significantly and substantially altered" "determinations" needed for petitioner to prevail); *Struthers*, 209 U.S. at 313 (substantively "affect the cause of action"); *Lyons v. Ohio Adult Parole Auth.*, 1997 WL 20401, at *11 (6th Cir. Jan. 22, 1997) (applying new statute's "higher burden" for

each case – irrespective of reliance (which was absent in most of the cases, see Appendix II below, and undiscussed in most of the rest) – the court held that the new statute's alteration of the pending cause of action would constitute a new legal consequence attached to the action's filing, hence a retroactive effect that would not be permitted absent clear legislative command.

Greene v. United States, 376 U.S. 149 (1964), is illustrative. Greene accepted employment and then was terminated by a military contractor when the Navy arbitrarily revoked his security clearance in 1953. Although at the time he apparently had no right to monetary restitution, the Defense Department gave him that right by regulation in 1955, and he applied for it in 1959. Because Greene's "rights" thus were "matured and . . . asserted under the 1955 directive" as of 1959, the Court ruled that the Department could not insist that Greene satisfy new "substantive requirements" and adduce proof supporting "additional factual determinations" that a 1960 regulation had imposed as prerequisites for restitution. *Id.* at 156-57, 160, 163.

Mr. Lindh's case fits squarely within the rule and holdings of these cases. His 1992 habeas petition, filed after exhausting his state remedies in 1991, established the two statutory elements of habeas relief – his "custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2241(c)(3).

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certifying habeas appeal to already filed appeal "would raise obvious retroactivity concerns"); *United States v. $814,254.76*, 51 F.3d 207, 212 (9th Cir. 1995) ("lower standard of proof[] directly implicates the concerns that animate . . . *Landgraf*"); *United States ex rel. Dabbs v. Page*, 1996 WL 467237, at *3 (N.D. Ill. 1996) ("narrows the standard of review"); *United States v. Eleven Vehicles*, 898 F.Supp. 1143, 1153 (E.D. Pa. 1995) (application of "different standard of proof . . . that permits [party to succeed] upon a lesser showing of culpability . . . cannot be countenanced under *Landgraf*"); *U.S. Steel Mining Co. v. Riddle*, 627 So.2d 455, 457-58 (Ala. Civ. App. 1993) (changes "standard of review"; alters " 'presumptions (and their effects) and burden of proof [which] are "substantive" ' " (quoting *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959))); other cases collected in Appendix II *infra*.

Under the statute as it then stood, he thereby caused his right to habeas relief to "mature[ ] and become unconditional." The terms of the governing statute could not be more directive: "[A] district court *shall* entertain an application for a writ of habeas corpus . . . on the ground that [the applicant] is in custody in violation of the Constitution. . . . " *Id.* § 2254(a) (emphasis added). "A court . . . entertaining an application for a writ of habeas corpus *shall* forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted. . . . " *Id.* § 2243 (emphasis added). "The court *shall* summarily hear and determine the facts and dispose of the matter as law and justice require." *Id.* (emphasis added). Under the law as it existed upon the filing of Mr. Lindh's petition in 1992, nothing short of Mr. Lindh's death – not even his unconditional release from prison, see *Carafas v. LaVallee*, 391 U.S. 234 (1968) – could have divested him of his right to relief from the constitutional violation in his case.

On the court of appeals' interpretation of the new statute, moreover, § 2254(d)'s application to Lindh's case interfered with his already matured cause of action in the most "substantive" of ways. On that interpretation, § 2254(d)'s precise design was to "adjust the circumstances under which the remedy of the writ of habeas corpus is deployed" (JA 186); to supplement the custody and constitutional error elements with a new one – that the "error [be] grave enough to be called unreasonable" (JA 181); in short, to transform Mr. Lindh's constitutional claim from one on which relief may well have been granted (JA 197) to one on which relief "cannot be" granted (*id.*). In retroactivity terms, the statute's precise design was to attach drastic new legal consequences to Mr. Lindh's "matured . . . and asserted" cause of action – to " 'change[ ] . . . the principles of liability' " and the "elements of" relief, *Landgraf*, 511 U.S. at 284-85 nn.37, 26; to impose new "substantive requirements" and require "additional factual determinations," *Greene*, 376 U.S. at 163; and, overall, to "alter the normative scope of" the writ, *Rivers*, 511 U.S. at 303.

The court of appeals did not deny that its reading of § 2254(d) constituted a change which "affect[ed] [petitioner's] substantive rights," *Landgraf*, 511 U.S. at 278, and "change[d] the legal consequences" of completed state court proceedings and a habeas petition already filed, *id.* at 269 n.23. Nor could the court reasonably have done so. If "changing . . . limits on the amount of damages available in wrongful death actions" is a "new legal consequence" (*id.* at 284 n.36) – and if "restricting subcontractors' rights to recover damages from prime contractors" is, too (*id.* at 285) – then changing the elements of a petitioner's already asserted claim, and limiting his preexisting right to relief for a constitutional violation, must also be "new legal consequences" under *Landgraf*. As the Second Circuit held with respect to the amended § 2254(d), if "the new statute would require a different outcome, application of the new statute . . . would be retroactive." *Boria v. Keane*, 90 F.3d 36, 37 (2d Cir. 1996). Any other conclusion flouts *Landgraf*.

3. Lindh's reliance

Although frustrated reliance interests do not exhaust "new legal consequences," they may be relevant; and they are present here. After the Wisconsin Supreme Court's adverse decision in 1991, Lindh had a choice of how to proceed. He could seek habeas relief in federal court, where the law at the time gave him a clear right to a *de novo* adjudication of his constitutional claim, or he could ask this Court to exercise its discretion to hear the case on certiorari. In reliance on the law as it then stood, Lindh gave up his chance for review by this Court and opted for his right to *de novo* review via federal habeas.

That decision was informed by the Court's longstanding practice of denying certiorari in "mixed question" cases expressly because federal habeas review was available.[34] As

[34] See, *e.g.*, *Schiro v. Indiana*, 493 U.S. 910, 911, 914 (1989) (opinion of Stevens, J., respecting denial of certiorari); *Davis v. Balkcom*, 369 U.S. 811, 811-12 (1962) (memorandum of Warren, C.J., respecting denial of certiorari); *Irvin v. Indiana*, 353 U.S. 948 (1957) (mem.); *Sheppard v. Ohio*, 352 U.S. 910, 910-11 (1956) (memorandum of Frankfurter, J., respecting denial of certiorari); *Burke v. Georgia*, 338 U.S. 941 (1950) (mem.).

Justice O'Connor has explained, the Court is disposed to deny certiorari following state direct review if the petitioner "can proceed to federal court and petition for a writ of habeas corpus," and if that avenue is "sufficient to afford full review of petitioner's substantial constitutional claim." *Wills v. Texas*, 114 S.Ct. 1867 (1994) (O'Connor, J., concurring in denial of certiorari). The crucial premise of this practice is the availability of "full [habeas] review" – which gives state prisoners federal review commensurate with the Court's review of mixed questions, and lets the Court limit its review to the narrow subset of cases in which lower federal courts have left constitutional error intact.[35] Justice Kennedy gave the same explanation for denying certiorari in *Spencer v. Georgia*, 500 U.S. 960, on June 3, 1991, during Mr. Lindh's April-July 1991 certiorari period:

> A majority of the Court has voted to deny certiorari and, after initial reservations, I now concur in that judgment. This case appears to present important questions of federal law, and if I thought our decision in *Teague v. Lane* . . . would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari.

Id. (Kennedy, J., concurring in denial of certiorari).

Under the habeas statute in place when Mr. Lindh declined to seek certiorari, his decision meant that he forwent a right to *request* this Court's plenary review but preserved the right to *receive* that review from the lower federal courts and *then* (if need be) seek the Court's review. As a "new legal consequence" of the court of appeals' interpretation and application of the 1996 amendment of § 2254(d), however, Lindh's decision to forgo certiorari turns out to have abdicated his only opportunity for plenary federal review and

[35] See, *e.g.*, *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *Miller v. Fenton*, 474 U.S. 104 (1985).

redress of his unconstitutional conviction. It thus is impossible to fathom the court of appeals' conclusion that "Lindh gave up nothing of value by deciding not to seek certiorari."[36]

B. No Presumption Exists that "Legal Changes that Reduce the Willingness of Federal Courts to Set Aside Judgments . . . Apply to Existing Judgments"

The second permeating theme in the decision below is the assertion that "legal changes that reduce the willingness of federal courts to set aside [state] judgments presumptively apply to existing judgments." JA 166.[37] This bald effort to

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[36] JA 171. The court's analysis of Lindh's decision to forgo state collateral review is equally flawed. As of 1991, such review was available to address any claim for relief that was not raised on direct review. See, *e.g.*, *Bergenthal v. State*, 242 N.W.2d 199, 200-01 (Wis. 1976). And Lindh had at least one such claim, based on documents (unsuccessfully proffered below, see note 3 *supra*) revealing that, on appeal, the State knowingly misrepresented facts that the Wisconsin Supreme Court then relied on in denying Lindh relief. In finding no detrimental reliance, the court below concluded that "Lindh does not qualify" for state collateral review under the strict rule of *State v. Escalona-Naranjo*, 517 N.W.2d 157 (Wis. 1994), "and, if he does, the state courts remain open to him." JA 171. What the court failed to note is that the *1994* decision in *Escalona-Naranjo* expressly *overruled* the decisions in effect in 1991 that permitted collateral review of claims not raised on direct review. *See Escalona-Naranjo* at 162 & n.11 (overruling, *e.g.*, *Bergenthal*, *supra*); Ellen Henak, *The Changing Rules Governing Relief After Direct Appeal*, Wis. Defender (Jan. 1997), at 1-2 ("For almost twenty years, trial courts in Wisconsin were obligated to decide [postconviction] motions on the merits regardless of whether the claim could have been raised on direct appeal. . . . In 1994, . . . *State v. Escalona-Naranjo* . . . abruptly changed the law . . . [and] prohibited [prisoners] from raising a claim . . . that could have been raised on direct appeal"). Lindh does not *now* "qualify" for state collateral review, and the state courts are not *now* "open to him," but he did qualify, and they were open, when he opted for what was then a superior federal habeas remedy.

[37] See, *e.g.*, JA 168 ("amended § 2254(d) is designed to curtail collateral review and augment the finality of judgments, which strongly implies application to existing judgments"); JA 164 ("prisoners have [no] legitimate expectations about the scope of collateral review"); JA 168 ("To leave the [state court] judgment in force – and to leave all of the rules governing primary conduct intact – is not 'retroactive' . . . , and the amended § 2254(d) is therefore presumptively applicable.").

transform the longstanding "presumption against retroactive legislation" (*Landgraf*, 511 U.S. at 265) into a presumption favoring it is no more availing than the effort to limit the "new legal consequences" that trigger the presumption to reliance interests. For the Court's "decisions simply do not support the proposition that [it] ha[s] espoused a 'presumption' in favor of retroactive application of [habeas-curtailing] statutes." *Rivers*, 511 U.S. at 310.

The court of appeals cited three kinds of decisions to support its alleged presumption. The first was *Felker v. Turpin*, 116 S.Ct. 2333 (1996), in which the Court relied on a section of the 1996 Act – barring the Court from granting certiorari to review a court of appeals' refusal to permit the filing of a successive habeas petition – in a case in which a successive petition was filed *after* April 24, 1996. *Id.* at 2336-37. Because Felker filed his petition after the Act became law, no retroactivity issue was presented or decided; still less was any "presumption" of retroactivity articulated.

The second kind of decision to which the court of appeals resorted as supporting a supposed presumption in favor of the retroactive application of habeas-curtailing legislation involved cases that it said applied previous habeas amendments to pending cases "without so much as remarking on the date of enactment."[38] In three of the cases, there was a plain reason the Court saw no retroactivity issue: the Court was applying new statutes that (as it pointed out in each case) simply codified existing judicial precedent.[39] In the fourth case – *Carafas v.*

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[38] JA 166-67, citing *Smith v. Yeager*, 393 U.S. 122, 124-25 (1968) (*per curiam*); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Gusik v. Schilder*, 340 U.S. 128, 131-33 & n.4 (1950); *Darr v. Burford*, 339 U.S. 200 (1950).

[39] *Darr*, 339 U.S. at 210-11 (" 'This new section is declaratory of existing law' "; it "gave legislative recognition to [Court's] rule for the exhaustion of remedies"; it "embod[ied] in the new statute the rulings

LaVallee, 391 U.S. 234 (1968) – the Court adopted the habeas petitioner's expansive view of the "custody" requirement based on language added to the habeas statute in *1867*, *id.* at 239 (quoting 28 U.S.C. § 2243), pausing only briefly to note some words in a 1966 amendment that "seem" to support the point. *Id.* Just how a passing aside to a new statute – in support of an *expansive* view of the writ arrived at on the basis of a *100-year-old* statute on the way to *granting* the petitioner the relief he sought – supports a presumption in favor of retroactive application of changes "that reduce the willingness of the federal courts to set aside state judgments," JA 166, is not explained.

The third kind of precedent cited for the supposed presumption are cases "holding that changes in the law affecting judicial ability to supply prospective relief govern pending cases." JA 167. These cases are irrelevant. In all of them the preexisting statute provided that conditions in existence at the time the court or agency *ruled* would determine the right to relief, and the new statute became law *before* any ruling was made – *i.e.*, before any rights "had matured or become unconditional." See note 32 above. The statutes thus attached no "new legal consequences to events *completed before* [their] enactment" *Landgraf*, 511 U.S. at 270 (emphasis added), but, instead, *antedated* the decisive events.

By contrast, habeas corpus is "quintessentially backward looking."[40] *Id.* at 282. The rights of the parties are determined

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drawn from the [the Court's] precedents"); *Gusik*, 340 U.S. at 131 (exhaustion "rule which Congress recently wrote into the Judicial Code" is "the holding of the Court in a long line of cases"); *Smith*, 393 U.S. at 124-25 (citing 1966 amendment to § 2244(d) together with *Sanders v. United States*, 373 U.S. 1 (1963), and a 1924 case in support of an "abuse of the writ" test taken nearly verbatim from *Sanders*' own, pre-amendment test, *Sanders*, 373 U.S. at 17-18); see *McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (1966 amendment to § 2244(b) " 'incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders*.' ").

[40] See *Pitchess v. Davis*, 421 U.S. 482, 489-90 (1975) (per curiam). This Court has frequently noted the corrective nature of habeas corpus

entirely by events occurring (1) *before the action was filed*, when the alleged violation took place at trial or when a state court rejected the claim on appeal; or (2) at the *precise moment* it is filed, when the question of the petitioner's "custody" is determined. *Carafas v. LaVallee*, 391 U.S. at 238 (if "petitioner's [habeas] application was filed . . . when he was in state custody, . . . jurisdiction attache[s] . . . [and] is not defeated by the release of the petitioner prior to completion of the proceedings"). See pp. 42-43 above.

Carafas's reason for making the filing of a habeas petition decisive in assessing "custody" provides an additional, pressing reason for a presumption *against* the retroactivity of habeas-curtailing statutes, and for making the petition's filing the "determinative event by which retroactivity . . . is to be calculated." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 & n.3 (1990) (Scalia, J., concurring). For as is graphically illustrated in this case by the *35 months* of deadweight delay in the district court (over Lindh's repeated objection), see pp. 3-4 above, any presumption *of* retroactivity, or any "determinative event" subsequent to the petition's filing, would

> simply aggravate[ ] the hardships that may result from "intolerable delay[s] in affording justice." The petitioner in this case was sentenced in 1960. He has been attempting to litigate his constitutional claim ever since. His path has been long . . . because of . . . delays in our court processes. . . . He should not be thwarted now and required to bear the

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relief. See, *e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 83 (1983) ("correct wrongs of a constitutional dimension"); *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982) ("correct violations of . . . constitutional rights"); *Hawk v. Olson*, 326 U.S. 271, 276 (1945) ("redress the violation of the federal constitutional right"); *Ex parte Watkins*, 32 U.S. (7 Pet.) 567, 573 (1833) ("revises and corrects the proceedings in a cause already instituted"); see also *Carey v. Brown*, 447 U.S. 455, 458 (1980) (sharply distinguishing between "attempt to attack collaterally [an] earlier state-court conviction[ ]" and "request [for] . . . prospective relief"); *Wooley v. Maynard*, 430 U.S. 705, 711 (1977) (similar).

> consequences of . . . unlawful conviction simply because the path has been so long. . . .

Carafas, 391 U.S. at 239-40 (citation omitted).

The effect of the proceedings and ruling below was likewise to lash Mr. Lindh to the tracks until the 1996 Act could overtake him and efface his previously unconditional right to relief. For centuries, the presumption against retroactivity has protected litigants against just this sort of "manifest injustice." *Kaiser*, 494 U.S. at 837. The court of appeals' trivialization of the concept of "new legal consequences," and the "presumption" it invented out of whole cloth, obliterate that protection. Moreover, the court's express transformation of the preexisting rights to due process and to habeas corpus to enforce it into mere "rights without remedies" (JA 185) and its application of that radical interpretation to deny Lindh's five-year-old petition are about as severe a set of new legal consequences attached to a completed event as may be imagined.

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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February 21, 1997

APPENDIX I

28 U.S.C. §§ 2241-2266, with Additions (in italics) and Deletions (redlined) Made by the Antiterrorism and Effective Death Penalty Act of 1996; and § 107(c) of that Act

CHAPTER 153 – HABEAS CORPUS

Sec.
2241. Power to grant writ.
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§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and

any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus ~~and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry~~ *except as provided in section 2255.*

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

~~(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for~~

~~a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.~~

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of

them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

§ 2253. *Appeal*

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> *(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court; or*
>
> *(B) the final order in a proceeding under section 2255.*

(2) A certificate of appealability under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

~~**§ 2253. Appeal**~~

~~In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.~~

~~There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.~~

~~An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.~~

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An applicant for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

~~(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.~~

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the

right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit~~

~~(1) that the merits of the factual dispute were not resolved in the State court hearing;~~

~~(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;~~

~~(3) that the material facts were not adequately developed at the State court hearing;~~

~~(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;~~

~~(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;~~

~~(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or~~

~~(7) that the applicant was otherwise denied due process of law in the State court proceeding;~~

~~(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.~~

~~And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.~~

(f)~~(e)~~ If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reasons is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g)~~(f)~~ A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall

not be a ground for relief in a proceeding shall not be a ground for relief in a proceeding arising under section 2254.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

~~A motion for such relief may be made at any time.~~

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attacks, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

~~The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.~~

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment making a motion created by governmental action in violation of the Constitution or laws of the Untied States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

CHAPTER 154 – SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

Sec.

2261. *Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute, procedures for appointment.*
2262. *Mandatory stay of execution; duration; limits on stays of execution; successive petitions.*
2263. *Filing of habeas corpus application; time requirements; tolling rules.*

2264. *Scope of Federal review; district court adjudications.*
2265. *Application to State unitary review procedure.*
2266. *Limitation periods for determining applications and motions.*

§2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record –

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and

accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence or counsel in such proceedings.

§2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction

review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if –

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

§2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court

affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled –

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if –

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

§2264. Section of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is –

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

§2265. Application to State unitary review procedure

(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under death of sentence to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for

that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to an "order under section 2261(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trail proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

§2266. Limitation periods for determining applications and motions.

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not

later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the

government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to –

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to –

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.".

Antiterrorism and Effective Death Penalty Act, § 107(c)

(c) EFFECTIVE DATE – Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

APPENDIX II

ILLUSTRATIVE DECISIONS IN WHICH RETROACTIVE EFFECTS WERE FOUND IN THE ABSENCE OF FRUSTRATED RELIANCE INTERESTS[1]

A. Decisions Cited as Authoritative by *Landgraf*

Many of the cases cited as authoritative by *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), or by cases *Landgraf* cites, found "retroactive effects" under a "new legal consequences" test although no frustrated reliance interests were present. Without claiming that this list is exhaustive even of the cases *Landgraf* cites, much less of American retroactivity law, we list some illustrative decisions and briefly discuss their facts.

1. **Bennett v. New Jersey*, 470 U.S. 632, 637-41, 644-45 (1985) (permitting Government to recoup funds from school district on ground that district misallocated funds among particular schools; Court applies regulation in effect at time recoupment action was filed (under which district's allocation among schools was improper) because that was when Government's claim " 'had matured or become unconditional' "; Court declines to apply new statute and regulation in effect at time suit was decided (under which allocation was proper), even though Government

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[1] Cases marked with an "*" refuse to apply new statutes or administrative regulations to pending actions because doing so would attach new legal consequences to events completed before the law's adoption. Cases marked with a "+" consider whether a statute or regulation that expressly applies to pending cases has retroactive effect and, if so, whether that effect violates the Constitution or an administrative agency's organic statute.

could show no detrimental reliance on prior regulation, both because Congress thereafter had declared district's allocation to be consistent with (not detrimental to) public interest,[2] and because Government owed district same amount of money under both regulations, the only question being whether money was properly allocated among district's schools).

2. +*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (cited in *Landgraf*, 511 U.S. at 261-65; discussed at pp. 33-34 *supra*).

3. **Dash v. Van Kleeck*, 7 Johns. 477, 482-84, 502, 511 (N.Y. 1811) (Kent, C.J.) (cited in *Landgraf*, 511 U.S. at 265 n.17) (refusing to apply 1810 law making escapee's recapture a complete defense to creditor's suit against sheriff for unlawfully letting debtor escape; no reliance interests because common "law . . . at the time" sheriff took custody and at time escape occurred gave sheriff same complete defense; retroactive effect found because creditor brought suit in 1809, after recent case had rejected "recapture" defense, and thus 1810 law "would . . . defeat a suit already commenced, upon a right [that had] already vested" under the law settled by the recent decision).

4. **Dempsey v. State*, 451 A.2d 273 (R.I. 1982); *Kleibrink v. Missouri-Kansas-Texas Ry.*, 581 P.2d 372, 378 (Kan. 1978) (both cited in *Landgraf*, 511 U.S. at 284 n.36, for rule that " '*decrease* . . . of the statutory maximum recoverable in wrongful death actions' " may not be applied to cases arising before new statute was adopted; no detrimental reliance because no possible claim that decedents would have tried harder to

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[2] See also, *e.g.*, *Miller v. United States*, 294 U.S. 435, 437-39 (1935); *Magnolia Petroleum*, *infra*; *White v. United States*, 191 U.S. 545 (1903) (all cited in *Landgraf*, 511 U.S. at 271 n.25).

avoid being killed had they known that amounts recoverable would be lower at time of judgment than at time of accident). Accord: *Zucker v. Voght*, 200 F.Supp. 340 (D. Conn. 1961); *Thomas v. Cumberland Operating Co.*, 569 P.2d 974 (Okla. 1977); *Lavieri v. Ulysses*, 180 A.2d 632 (Conn. 1962); *Gustafson v. Bertschinger*, 108 N.W.2d 273 (Wis. 1961).

5. **Greene v. United States*, 376 U.S. 149 (1964) (cited in *Landgraf*, 511 U.S. at 272 n.26; discussed at p. 42 *supra*).

6. +*Louisville & N. Ry. v. Mottley*, 219 U.S. 467, 472, 484-86 (1911) (discussed at pp. 32-33 n.22 *supra*) (Court finds new act's ban on discriminatory railway pricing to be "retroactive[]" when applied to rescind lifetime pass given plaintiff after accident on one of defendant's trains, though Court declines to consider claimed detrimental reliance because it is of "secondary" sort caused by nearly all legislation).

7. **Rivers v. Roadway Express*, 511 U.S. 298 (1994) (discussed at p. 34 *supra*).

8. **Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767, 769 (No. 13,156) (C.C.D.N.H. 1814) (Story, J.) (cited in *Landgraf*, 511 U.S. at 268-69, 283) (upon discovering defendants on its land, plaintiff sued to eject, at time when law required no compensation for improvements made by interlopers; because filing of suit caused plaintiff's right of ejectment without paying compensation to be "vested[,] . . . absolute and unconditional," court reversed lower court's application of statute enacted after filing of suit that required compensation for improvements; aside from not filing suit (an option that does not distinguish *Society* plaintiff from Lindh), plaintiff could have done nothing differently had new statute been in effect when it discovered interlopers and sued).

9. **United States v. Heth*, 7 U.S. (3 Cranch) 399, 407-08, 413, 414 (1806) (cited in *Landgraf*, 511 U.S. at 270) (Court "admit[s] the correctness" of Government's claim that, due to prior course of dealing, customs collectors had no basis to assume that statutory proportion of duties due them at time duties actually were paid would be same as at earlier time when they completed relevant paperwork; Court nonetheless forbids Government to apply new statutory compensation rate, in effect when duties were paid, to duties for which collectors had completed paperwork when different statute with higher compensation rate was in effect; even absent reasonable reliance, doing so would "affect or interfere with . . . antecedent rights [and] services" and "divest vested rights").

10. **United States v. Magnolia Petr. Co.*, 276 U.S. 160, 160-63 (1928) (cited in *Landgraf*, 511 U.S. at 271 n.25) (interest on overpayment of taxes for years 1916 and 1917 must be calculated from six months after claim for refund was filed in 1923 (as provided for by 1921 statute in effect when request for refund was filed) rather than from date of overpayment (as provided for by statute adopted in 1924), though Government had no notice of overpayment until 1923 and thus could have done nothing to limit amount of interest owed for 1916-1923 period, even had it known, when request for refund was filed, that it was liable for interest from date of overpayment).

11. **United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306 (1908) (cited in *Landgraf*, 511 U.S. at 284-85) (Court finds "retroactive" effect and refuses to apply new statute giving Government preference over other creditors of general contractor because statute was enacted after plaintiff subcontractor had performed and formally

demanded payment and, thus, after plaintiff's right to recover was "settled, and the cause of action already [was] in existence"; only possible reliance (not asserted in case) was of "secondary" sort that is irrelevant for retroactivity purposes (see *Landgraf*, 511 U.S. at 269 n.24), namely, possible diminution in value of subcontracting arrangements in wake of statutory changes made for other reasons).

12. *+Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (cited in *Landgraf*, 511 U.S. at 266, 267 n.21, 272) (Black Lung Act held to require "retrospective imposition of liability" – *i.e.*, to "impose a new duty or liability based on past acts" – despite absence of any "contention that [defendants] would have taken steps to reduce or eliminate the incidence of [the disease] had the law imposed liability upon them" at time of their pre-Act behavior).

13. *+Welch v. Henry*, 305 U.S. 134, 146 (1938) (discussed at pp. 32-33 n.22 *supra*) (Court finds that statute enacted "in 1935 [that] imposed a tax on [dividend] income received in 1933" was "retroactive" and "retroactively applied" to petitioner shareholder, though Court expressly rejects petitioner's reliance argument: "We cannot assume that stockholders would refuse to receive corporate dividends even if they knew their receipt would later be subjected to a new tax.").

14. **Winfree v. Northern Pac. R. Co.*, 227 U.S. 296, 301-02 (1913) (cited in *Landgraf*, 511 U.S. at 284) (Court refuses to subject defendant to new federal wrongful death act, though defendant's pre-act conduct was subject to state wrongful death cause of action and railroad's defenses to federal cause of action were same as its defenses to state cause of action, because new law substantively altered defendant's liability

by "giv[ing] the right of action" to different plaintiff).

B. Illustrative Post-*Landgraf* Decisions

15. +*Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1510, 1447, 1461-62, 1469 (1995) (Court invalidates new statute expressly permitting particular class of judgments to be reopened; statute found to be "retroactive" under *Landgraf* despite parties' awareness before new statute was enacted that affected judgments could be reopened under several preexisting, unchallenged provisions).

16. **Bator v. Hawai'i*, 910 F.Supp. 479, 485-86 (D. Haw. 1995) (court refuses to let plaintiff amend complaint to add "new [state statutory] cause of action" for damages for sexual harassment although conduct alleged in amended complaint was basis for damages under federal statutes in existence at time of, and relied on in, original complaint and also had previously been basis for administrative award of monetary relief).

17. **Brown v. Cain*, 1997 WL 20736, at *3 (5th Cir. Jan. 21, 1997) (in state-prisoner habeas appeal filed and certified under preexisting standard permitting appeal of *all* claims upon finding of *one* nonfrivolous claim, court refuses to apply new statute requiring *each* claim to be certified under new standard; though petitioner could have done nothing to strengthen claims made in district court had he known that new standards would apply, court declines to frustrate his " 'settled expectation' . . . that he had successfully passed all . . . hurdles to [appellate] consideration of [all] his claims"). Accord: *Nickel v. Hannigan*, 97 F.3d 403, 407 n.4 (10th Cir. 1996).

18. **Burkett v. Love*, 89 F.3d 135, 138 & n.2 (3d Cir. 1996) (refusing to apply new statutory controls on successive habeas petitions to already pending successive claim although claim had only recently become discoverable and petitioner could not have included it in initial petition had he known that new restrictions on successive actions would apply). Accord: *Williams v. Calderon*, 83 F.3d 281, 285 (9th Cir. 1996); *Warner v. United States*, 926 F.Supp. 1387, 1390 n.4 (E.D. Ark. 1996).

19. **Martin v. United States*, 96 F.3d 853, 855 (7th Cir. 1996) (in federal-prisoner § 2255 appeal filed when no certification to appeal was required, court refuses to apply new statutory requirement of pre-appeal certification; though prisoner could have done nothing to strengthen claims made in district court had he known that certification would be required, denying appeal for failure to qualify for certification "would attach a new legal consequence to a completed act [the filing of the appeal] and is therefore . . . [impermissibly] retroactive[]" absent clear statutory intent). Accord: *Lyons v. Ohio Adult Parole Auth.*, 1997 WL 20401, at *11 (6th Cir. Jan. 22, 1997); *Thye v. United States*, 96 F.3d 635, 637 (2d Cir. 1996); *United States v. Lopez*, 100 F.3d 113, 117 (10th Cir. 1996).

20. **Mathews v. Kidder, Peabody & Co.*, 947 F.Supp. 180, 181, 185 (W.D. Pa. 1996) (court refuses to apply Private Securities Litigation Reform Act of 1995 to deprive court of jurisdiction and "deprive [plaintiffs] of their [pending civil RICO] causes of actions" for fraudulent sales of limited partnerships; no claim that plaintiffs – "unsophisticated 'Mom and Pop' investors" – would have avoided being defrauded

had they known that civil RICO remedy would be withdrawn, leaving them to state fraud remedies). Accord: *Klein v. Boyd*, 1996 WL 675554, at *29-*30 (E.D. Pa. Nov. 19, 1996); *District 65 v. Prudential Sec.*, 925 F.Supp. 1551, 1568-70 (N.D. Ga. 1996).

APPENDIX III

ILLUSTRATIVE DECISIONS IN WHICH DUE PROCESS VIOLATIONS WERE FOUND ON THE BASIS OF STATE DEPRIVATION OF EXPECTED BENEFITS OR BROKEN PROMISES IN THE ABSENCE OF FRUSTRATED RELIANCE INTERESTS

A. Procedural Due Process: Deprivations of Entitlements Created by State Positive Law

The antiretroactivity and procedural due process doctrines are analogous. Both constrain the government's "power to sweep away settled expectations . . . without individualized consideration." *Landgraf*, 511 U.S. at 266. Both are triggered by the State's withdrawal of "affirmative enforceable right[s]." *Weaver v. Graham*, 450 U.S. 24, 29-30 & n.13 (1981); see *Vitek v. Jones*, 445 U.S. 480, 490-91 (1980). And both presume the State's power to withhold the benefit in question, addressing only the conditions under which the State may withdraw a benefit after having adopted a statute or regulation creating a "reasonable expectation" of the benefit. *United States v. Heth*, 7 U.S. (3 Cranch) 399, 407-08 (1806); *Vitek* at 490; see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 432-33 (1982) (analogizing right to hearing prior to administrative frustration of legitimate expectations, and right to fair legislative process – including assumedly the presumption of prospectivity – prior to legislative frustration of expectations). The illustrative "no reliance" cases collected below reveal that procedural due process protection is triggered by the state's withdrawal of enforceable expectations, not by detrimental reliance.

1. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (violation found because state employment commission lost jurisdiction over petitioner's timely filed claim by failing to hold conference of parties within 120 days as required by statute; petitioner had no alternative remedy, and there was nothing he could have done differently had he known that delay beyond his control would extinguish claim).

2. *Morrissey v. Brewer*, 408 U.S. 471 (1972) (violation found based on denial of prompt parole revocation hearing following parolees' arrest; parolees benefited by right to hearing – ones who had not committed any offense or parole violation – could not have behaved even *more* innocently had they known they could be arrested and held indefinitely).

3. *Vitek v. Jones*, 445 U.S. 480 (1980) (violation found following prisoner's transfer to mental facility without hearing into mental defect; petitioner could not have altered his mental condition had he known he could be transferred at will).

4. *Wolff v. McDonnell*, 418 U.S. 539 (1974) (violation found absent showing that unavailability of assured good time credits would have caused prisoner to misbehave).

B. Breaking of Implied Promise that Silence Would Not Be Used Against Witness or Suspect

5. *Raley v. Ohio*, 360 U.S. 423, 439 (1959) (due process violation to punish immunized witnesses for contempt for refusing to testify after commission chairman told them they had right to remain silent; decision not affected by witnesses' "expressed defiance" and suggestion that they "might have behaved the same way regardless of what the Commission told them").

6. *Wainwright v. Greenfield*, 474 U.S. 284, 290, 292 (1986) (due process violation to give suspect "implied promise" that "his silence will not be used against him and thereafter to breach that promise by using his silence . . . to overcome [a] plea of insanity"; no claim that petitioner would have behaved less "sanely" when arrested had he not received *Miranda* warnings).